RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक १६] गुरुवार ते बुधवार, जुलै ३-९, २०१४/आषाढ १२-१८, शके १९३६ [पृष्ठे ४०, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.

IN THE EMPLOYEES' INSURANCE COURT, AT MUMBAI

BEFORE SHRI P. B. SAWANT, JUDGE

APPEAL (ESI) No. 1 of 1998.—Regional Director, E.S.I. Corporation, Mumbai.–*Applicant,*—*Versus*—(1) Rajaram Shankar Malusare, C/o. Maharashtra Playing Cards, Aggarwal Industrial Estate, Kaman Road, Vasai (East), Dist. Thane. (2) *Medical Appeal Tribunal, Mumbai.*—*Respondents.*

CORAM.— Shri P. B. Sawant, Judge.

Appearances.— Shri. G. M. Daftary, Advocate for Appellant ;
Shri A. Mathew, Advocate for Respondent.

Judgment

1. This Appeal has arisen out of the Judgment of the Medical Appeal Tribunal under Section 95 of the E.S.I. Act. The facts which gave rise to the present proceeding can be stated in nutshell as below.

2. The Respondent Shri Malusare is an insured person under the provisions of the E.S.I. Act and was in the employment of Maharashtra Playing Cards which is covered under the E.S.I. Act and allottee of a registration number. The Respondent No. 2 Medical Appeal Tribunal is comprising of one Judicial Officer, Medical Expert and a member of the Tribunal. It is submitted that in the event of sickness, accident etc. the Corporation is providing the benefits in cash and in the form of treatment in the various hospitals on 24th November 1994 at about 8.30 a.m., the Respondent Shri Malusare got his left hand entangled in the cutting Machine. He was given treatment immediately and the Respondent No. 2 forwarded the accident report in form No. 16 to meet out with the requirements as per law. Thereafter, the case of the employee was referred to the Medical Board for assessment of the quantum of loss of earning capacity arising out of employment injury. All the details were submitted by the Corporation as required under Section 54 of the E.S.I. Act for such assessment of earning capacity. After examining the employee by the Medical Board on 6th October 1995. After examining the nature of injury, the Board has fixed loss of earning capacity at 7%.

3. The Corporation asserts that the said decision of the quantum of loss of earning capacity was just, proper and legal. Accordingly, the Corporation has worked out the disability benefits. The Respondent workman preferred his Appeal with the Medical Appeal Tribunal Respondent No. 2 for enhancing his amount being not satisfied with the same percentage of loss of earning capacity. After hearing the Appeal, the Medical Appeal Tribunal allowed the Appeal and enhanced the percentage from 7% to 55%. Being aggrieved and dissatisfied with the said order of enhancement, the present Appeal is filed contending therein that the said order is erroneous and without any justification. It is pointed out that the conclusion drawn by the Medical Appeal Tribunal is not as per the legal provisions. It is further pointed out that the Tribunal has exceeded its jurisdiction while assessing the rate of loss of earning capacity. The two sets of injuries on the person who is insured has been misconstrued by the Tribunal in enhancing the loss of earning capacity. It is alleged that the Tribunal has decided the loss of earning capacity upon rhetoric statements of the insured person and thereby caused an illegality in the entire conclusion.

4. It is alleged that the Tribunal, therefore, has erred in exhorbitantly increasing the rate of loss of earning capacity without any sufficient cause and sufficient material. Therefore, from this and other grounds, the Appellant prays to set aside the order passed by the Medical Appeal Tribunal and prayed that either this Court should direct for reassessment of the disability of the insured person or hold that the decision of the Medical Board was just and proper.

5. The Respondent No. 1 has resisted all the contentions contending therein that the Appeal is not legal and proper and prays for dismissal of the Appeal. Simultaneously, reiterates the decision of the Medical Appeal Tribunal. It is pointed out that there is no perversity in the finding of the Appeal Tribunal. On the contrary, it is a finding of fact. The workman is permanently injured. It is pointed out that the Corporation is working for the welfare of the employees and, therefore, the Corporation should have accepted the findings of the Tribunal. With these and other grounds, it is prayed that the Appeal filed be dismissed.

6. On these rival contentions, following points arise for my determination :–

Points	*Findings*
(1) Does the Applicant prove that the Medical Appeal Tribunal has erred in enhancing the earning capacity of the employee Shri Rajaram S. Malusare to the extent of 55% ?	Negative.
(2) What order ?	As per final order.

Reasons

7. Having regard to the intention of the Legislature for drafting the social Legislature such as present one *i.e.* E.S.I. Act, it is necessary to bear in mind that the ultimate intention of the Legislature is to see the beneficial interest of the workers *i.e.* weaker section only. While resorting to the extend of benefites under the purview of the social legislation, the Corporation has to be deligent in assessing the true sense in the word “employment injury” as well as to assert that an appropriate ratio of loss of earning capacity is being assessed.

8. In pursuation of these broad outlines, the instances as alleged has to be construed in a sense to ascertain as to whether the earning capacity as being properly valid or not. While taking a recourse from that line of thinking, one has to assail on the difference in between the loss of physical capacity and loss of earing capacity. In my view, those are distinct though are entangled to each other. Unless and until, there is a loss to the physical health, it cannot be held that the earning capacity is reduced considerably. In other words, the reduction of earning capacity depends upon how far the physical loss is caused. The physical loss, therefore, thought plays a prominent role, the percentage physical loss cannot be equated with the lost of earning capacity, with the schedule under regulation for fixing the percentage of loss. However, a straight jacket formula referring to the percentage in the schedule cannot be appended to. A skilled workman if loses a lien which he used to utilise for dicharging his duty of a skilled workman, then though as per schedule, the loss of physical capacity be less but the loss of earning capacity may be 100%. If this anology is made applicable, then sudden rise and fall in the percentage of the earning capacity of an insured and injured employee shall be crystally clear.

9. So far as the employment injury caused to the Respondent Shri Malusare is concerned, there is no dispute. There is also no dispute that he was insured and that the establishment in which he was working is also covered under the Act. Therefore, the information in form No. 16 in consonance with the regulation 68 under the E.S.I. Act office the responsibility of law for discharging the responsibility of an employer. The papers to that effect are before me showing that the employee was semiskilled. He had a fracture injury due to the accident in the shoulder. He was admitted in the hospital and as per form B.R.O. 167, the period of incapacity was shown as 24th November 1994 to 6th July 1995 and thereafter verifying the number of employees by the Medical Board dated 6th October 1995, fixed the percentage at 7%. The Board has opined that there was no appreciable disablement. The subsequent form at Sr. No. 11 Annexure 'E' shows the diagnosis and in clause No. 5 sub-clause (*1*) about the appreciable disablement and the Medical Board has opined that there is an appreciable disablement and in column 2(B), the disablement is declared as final. Sub-clause (*1*) below 28, the loss of earning capacity has been question. In pursuance of this fact, that it is clear that the Medical Board has held that there was a permanent loss of earning capacity but the disablement was 7%.

10. Hon'ble Their Lordships of Kerala High Court in a case of *United India Insurance Co. Vs. Setu Mathavan, 1993-I-LLJ-142* have pointed out that though the disability certificate is one of the basic documents necessary to establish the disablement sustained by the workman as a result of sustaining injury that cannot be equated with loss of earning power. The loss of earning power is a question of fact which has to be judged on the basis of the nature of injury sustained and also with due regard, the nature of avocation of the workman at the time when he sustained injury along with other attending factors. Having regard to these principles, it is clear that the loss of earning power seeme to have been construed by the Corporation as 7% irrespective of fact that the percentage was pertaining to the loss of physical capacity. The Appeal preferred by the employee, therefore, was in view of the above misconstruction of the percentage of disablement and percentage of earning capacity. Referring to the cryptic finding of the Appeal Tribunal, the finding is in a cyclostyled manner. It spells out that for examining and considering the legal ..... . What are the findings after examining the Appellant are not reproduced on record. Besides what legal position has been referred to the Appeal Tribunal is also not reproduced nor the order postulates that the order passed is out of certain legal provisions. Apparently, it is clear that the findings of the Appeal Tribunal regarding increasing the percentage or loss of earning capacity is not supported with any reasoning or even cogent reason. Referring to these fact matrics, this Court cannot thrashed out the Appeal merely because the Appeal Tribunal has not given any proper and cogent reason. While sitting in appeal, this Court has the authority to reappraise the evidence and even to have its own finding on the assessed evidence. While referring to that process, I have referred to all the medical certificates which were before the Medical Board. Section 54A of the E.S.I. Act deals with the references to the Medical Board and the Medical Appeal Tribunal.

11. Learned Advocate, Shri Daftary has vehemently submitted reiterating the cryptic order passed by the Appeal Tribunal. According to learned Advocate, Shri Daftary, the order is without any basis or justification. As stated earlier, though the order does not spell out any sufficient forceful ground for increase in the percentage or for interfering with the decision of the Medical Board, the question still remains for consideration of this Court as to whether really there was a loss of earning capacity and that of the percentage can be exceeded upto 55%. Hon'ble His Lordship of Hon'ble Allahabad High Court in a case of *Ram Awadh Vs. Employees State Insurance Corporation. 1995-II-LLJ-369* have cautioned the Court before interefering with the finding of fact. The adequent words are required to be reproduced below :–

> "The E.S.I. Court should normally not interfere with the conclusions arrived by the Medical Appeal Tribunal except where it finds that the conclusions are based on no valied material or they are perverse or otherwise vitiated by reason of any mistake of law or fact."

In careful abidence with these guidelines, at the outset, it has to be ascertained that this Court has to interfere with in the order as the order of the Appeal Tribunal is not a reasoned order. However, the interference will not necessarily be of setting aside the entire order. This Court can very well criticise the manner in which the Appeal Tribunal has dealt with the instant case. On the bare look to the said order, it is clear that it is passed in a very casual manner that too when the Appeal Tribunal is presided over by a judicial officer. The Medical Board under Section 54A of the E.S.I. Act has determined the percentage and such determination has been held by this Court as a determination of physical capacity or disablement. Therefore, while referring to the distinction between the physical incapacity and earning capacity referred to above not only this Court but every one will expect that Appeal Tribunal while interfering with the finding of the Medical Board shall spell out a reasoned order referring to the exact nature of injury and its impact over the working capacity of the employee. Simultaneously, it is also expected that if at all percentage of loss of physical health is to be changed, then it has to be established that such loss of physical incapacity has affected on the earning capacity of the employee.

12. In pursuance of the above, learned Advocate, Shri Daftary has vehemently submitted that there is no *iota* of evidence showing that the injured workman has reduced his earning as well as he has not been able to work which he was rendering prior to causing the injury. Therefore, there is no reason to exceed the jurisdiction. In my opinion, the nature of injury sustained by the employee is admittedly non-schedule injury. Therefore, the nature of duty Shri Malusare was performing has to be taken into consideration. As shown from the accident report under form No. 16, it is made clear that he was highly skilled workmen prior to the accident and now after the accident, he has been employed as an unskilled workman. If this fact is taken into consideration, obviously, it is clear that the employee is not able to get further benefits which he would have got if he would have continued to be as highly skilled workman. By virtue of this proposition, the future loss caused to the workman has to be taken into consideration. It is not only that the injury is material but simultaneously, its impact on the future career is also important. Therefore, if the employee after the accident is not able to step ahead in the promotional channel or to get more benefits, is obviously at loss and that loss will have to be taken into consideration.

13. Another aspect which has been brought ahead by learned Advocate, Shri Mathew is also carries importance and it relates to performance factor of the employee. It is pointed out the probability by referring to the calamity if occured regarding dispensing with the services of the employee is concerned. In that event, such injured person with a reduced rank will be losing his importance in the labour market and this aspect also needs to be taken into consideration, because the redeployment or getting new service in some other employment becames a deebing chance. Therefore, having overall approach to the matter, it appears that the Corporation while referring the Appeal has only concentrated on the figure than the substance. Admittedly, the difference in between the two percentage drawn by the different authority under the purview by which they are governed is having a big gap in between. The Appeal Tribunal has taken the percentage to the utmost possible referring to the loss of earning capacity. In my opinion, the proper construction while computing the benefits in terms of money in such case is by virtue of loss of earning capacity only. While concentrating on the averments advanced by the learned Advocate, Shri Daftary, it appears that Shri Daftary intends to make this Court to concentrate on the percentage drawn by Medical Board referring to the physical disablement. I do not agree with his view. I have fortified my conclusion by relying on the observation of Hon'ble Apex Court in a case of *Employees' State Insurance Corporation Vs. Ammer Hasan, 1981-I-LLJ-164.* Hon'ble His Lordship has criticised the action of the Corporation for dragging a workman into litigation. However, without going into that controversy in this case, I have only concentrated on the observation that :–

> "The glaring paraox is that the workman suffers deduction from his wages so that the Corporation can light him with his own money. This has led to mounting disaffection amongst industrial workmen against the Corporation. What faith the workman will have to in the

Corporation set upto ameliorate his misery multiplying it by appeal to Court after Court compelling the workmen to follow in the footsteps of the Corporation to save his meagre benefit ? A time has come to cry a halt to this litigous mentality on the part of public Corporations set up to achieve the goals enumerated in the Constitution. This approach is destructive of the purpose which Corporation was set up".

14. Having regard to this observation, I have found no substance in the grounds raised by the Corporation to turn the observation of the Appeal Tribunal. Though the findings of the Appeal Tribunal are not supported with reasons, this Court itself has made endure go to the records showing the evidence reflecting that the workman has really lost the earning capacity to the extent of which the benefits are computed 55%. Hence, I answer the above point accordingly.

In the result, the Appeal must fail. Hence, the order :–

Order

The Appeal is hereby dismissed.

Parties to bear their own costs.

P. B. SAWANT,
Judge,
Employees' Insurance Court,
Mumbai.

Mumbai,
Dated 24th September 2001.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

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IN THE EMPLOYEE'S INSURANCE COURT AT MUMBAI

BEFORE SHRI P. B. SAWANT, JUDGE

APPLICATION (ESI) No. 123 of 1991.—M/s. Kheraj Electrical Industries, 11/BC, Old Anjirwadi, Dr. Mascarenhas Road, Mazgaon, Bombay 400 010.—*Applicant—Versus*—(1) The Regional Director, Employees, State Insurance Corpn. ESIC Building, Colaba, Bombay 400 005, (2) The Collector of Bombay, Old Custom House, Fort, Bombay 400 005.—*Opponents.*

CORAM.— Shri P. B. Sawant, Judge.

Appearances.— Shri A. Mathew, Advocate for the Applicant.

Shri G. M. Daftary, Advocate for Opponent.

Judgment

1. The Applicant has filed the present application under section 75 of the E. S. I. Act and has resisted the order passed by the Regional Director of E.S.I. Corporation under section 45A of the Act. The brief facts which gave rise to the present application can be summarised as follows.

2. The Applicant is manufacturing electrical appliances on 28th April 1988 Assistant Regional Director-Vigilence visited the establishment and asked the Applicant relevant records since the inception of the establishment up to March, 1983. The Applicants were not able to produce the records as it was eaten by white ants and the remaining part of the records eaten by the white ants were shown to the said officer. By letter, it was also informed by the Applicant about the destruction of records due to white ants and also informed that the record for the period from 1983 to 1986 was already verified by the Inspector and the remaining record, post 1986 was made available for the inspection.

3. The Applicant received a notice in form C-18 showing the figure of Rs. 72,094 by which there is a determination of contribution on *ad hoc* basis for the period from 12th November, 1978 to 31st March 1988. By reply the Applicant informed the Corporation so far as its powers to invoke section 45A is concerned and requested to reconsider the coverage. Thereafter on 6th January 1989, another notice was received in suppression of earlier notice asking the Applicant to pay Rs. 57.401.20 P. The period given was of the same as mentioned in the earlier notice. Though the amounts in both the notices have deferred. According to the Applicant, the said amount is on assumed wages and, therefore, has been challenged by the Applicant.

4. Inspite of thease contentions, the Applicant received order from the Corporation under section 45A dated 17th February 1989 by which the contribution is determined at Rs. 46,800.60 P. and the amount of interest has also been calculated from 12th November 1978 onwards. According to the Applicant, the letters sent by the Applicant are not seen by the authorities. The order passed by the A.R.D. is without any reasons for claiming the contribution from 12th November 1978. After the gap of years, the Applicant received recovery certificate for the recovery of Rs. 74,712 and the process was initiated.

5. It is the contention of the Applicant that the recovery and covering this establishment is arbitrary, illegal and bad in law and is liable to be quashed. It is alleged that no personal hearing was given prior to the decision. The copies of preliminary inspection were not given to the applicant. There is no justification for determining the contribution from 12th November 1978 to 31st March 1988. The request of the Applicant for deciding the issue of coverage as a preliminary issue has not been considered. Thereby the authority has misused the powers. Besides without furnishing any information, the order was straight way passed. It is also alleged that the Corporation has arbitrarily fixed the interest on the assumed wages. There is no reason for claiming the interest at the higher rate. Therefore, it is prayed that the order passed by the A. R. D. be declared *as nul and void* and in contravention of the regulations under the Act. The determination of amount of contribution and the interest be considered as illegal and be quashed. The Recovery Officer be restrained from recovering the amount and also prayed for the costs of the application.

6. The Opponent Corporation and the Opponent No. 2 have filed a composite written statement *vide* Exh. 5 contending *interallia* that the application is false and frivolous and the same is liable to be dismissed. It is the first and foremost contention that the Applicant has failed to bring out the entire facts of the case and on the contrary, suppressed the full information. Therefore, the application is devoid of any sustance. The survey was carried out by the Inspector on 15th June 1987 and 18th June 1987.

7. The coverage was made provisionally with intimation to the Applicant. Inspite of that the Applicant has not started compliance nor paid any contribution nor any returns were produced about the records. Inspite of request, form O-1 was also not submitted. Therefore, the Corporation having reasons to believe that the Applicant has not produced any record for the earlier period to avoid coverage from 12th November 1978, then the case was transposed to vigilence wing for investigation. The Applicant has not produced any record before the Vigilence Officer also.

8. It is denied that there was inability on the part of the Applicant to produce the record though it was requested by the Vigilence Officer to produce the record in whatever condition it may be. In the absence of any record, the Applicant factory is covered from 12th November 1978. The subsequent events, therefore, followed as per the provisions of law. The allegations about arbitrariness and illegality in the action and the orders passed by the Corporation has been denied. It is denied that the principles of natural justice are not followed. On the contrary, it is pointed out that after giving full opportunity and after applying the mind, the facts and legal proposition, the order has been passed by the authority. It is therefore, prayed that the application be dismissed and the Court should hold that the Applicant is asineable to the provisions of the Act and that the order passed by the authority is proper, legal and valid and that the Applicant is liable to pay the amount with interest at the rate of 12% p.a.

9. On these averments, following points are framed at Exh. 12 and I have adopted the same for my consideration :—

(1)	Does the Applicant prove that its factory is not amenable to the provisions of the Act under section 1(5) and notification issued by Government of Maharashtra *w.e.f.* 12th November 1978 and the Applicant has not purposely suppressed the records so as to evade coverage ?	: Not prove.
(2)	Does the Applicant company prove that the orders passed by the ESI Authorities on 2nd February 1989 under section 45A of the ESI Act, 1948 are not proper, legal, valid and in accordance with law ?	: The order passed by ESI Authorities is not proper for the period 1983 till 1988. However, it is proper and valid for the period from November, 1978 to December 1982.
(3)	Does the Applicant company prove that it is not liable to pay contribution of Rs. 74,712 as per C-19 dated 13th August, 1991 and further interest as asked by the E.S.I. Corporation ?	: No. The Applicant is liable to pay contribution with interest at the rate of 6% p.a. from the date amount falling due till the date of filing the application.
(4)	Is the Applicant entitled to any relief ? If so, to what extent ?	: As per final order.

Reasons

10. *Point No. 1.*—The applicability of the Act after Notification of 1978 needs to be construed by referring to sub-section (*5*) of section 1 of the Act. Therefore, when the Corporation has come to a conclusion for making the Applicant establishment amenable to the provisions of the Act, we require to note the factual aspects besides the documents as being relied on by the corporation for giving such conclusion. As averred in the application, visit of the authority under the Act to the establishment has been said to have been initiated on 28th April 1988. It is pertinent to note that the application is silent so far as earlier visits of the Inspectors if any. As against this, the Corporation has made it clear by the contention Exh. 5 that the matter was sent to the vigilence department and, therefore, the authority has paid the visit. Keeping aside the said aspect for a while, I have looked into the documents produced along with list Exh. 10. Those are inclusive of the inspection report by which the period covered was 1st January 1983 to June, 1987. In column 10, it is mentioned that from 2nd May 1983, the factory is covered as 10 persons were employed on that day with the use of power. The chart pertaining to the number of employees is mentioned is annexed to the report which shows that in the month of May, 1983, April 1985 and May, 1985 the number of employees have been encircled and thereafter in between the period the strength of the employees has been varied from 10 to 11 and some time it has gone down up to 8. It appears that the strength of the employees in the sales office has also been considered and added for comprising the total complement in the factory. This has relevance to column 10 of the report which shows that numbers have increased from 10 and above.

11. Learned Advocate Shri Mathew has disputed the coverage basically on the ground that the establishment has been covered with retrespective effect. He has referred to the order passed by the corporation which is according to him, without application of mind. Admittedly, the record pre 1983 was demanded in the year 1988. The written statement filed by the corporation indicates that the Inspector has visited on 15th June 1987 for survey and the persons found employed were more than 10 from 2nd May 1983. Now, in this situation, the record pre 1983 could not be produced because of the white ants. If for the sake of arguments, submissions are accepted, then remaining residues of the registers could have been put up before the Inspector any other record like photographs of those could have been produced before the authority for verification. The repeated submissions refers to the spoiled record. Therefore, there remained as a part of evidence by word to word and not supported with any documents. The document at page No. 6 with Exh. 10 relates to the letter issued by the Applicant dated 18th June 1987 showing that all the documents pertaining to ledger, cash book and other record prior to April, 1983 have been eaten by white ants. By these submissions, the Applicant has requested the Corporation to condone the inspection of earlier records. At this juncture, one has to bear in mind that the Applicant was well aware with the facts of maintaining the records and in fact, the record was maintained by the Applicant. Therefore, when the record of earlier 5 years period has been destroyed by white ants, then there must be some destruction of records preserved by the Applicant. Therefore, either the Applicant is suppressing some material or either the Applicant was not intending to produce the record from the very inception of the establishment. In this anamolous position, the facts on record through the documents with Exh.10 has to be looked to again.

12. Exh. 17 is a visit note dated 18th June 1987 by one Shri Bhavnani Inspector of the Corporation. He has inspected the Muster-roll-*cum*-wage Registers and Ledgers. All these registers are from 1983 onwards. He has made endorsement with record pre 1983 has been destroyed by the white ants. After submission of the report of Shri Bhavanani, form C-11 was sent to the Applicant pointing out the applicability of the Act to the establishment of the Applicant. Sub-section (*5*) of section 1 indicates that the appropriate Government may extend the provisions of the Act to the establishment or class of establishments, industrial, commercial, agricultural or otherwise. In pursuance of the provisions, the Inspector has found that 10 or more persons are working with the aid of power forming the establishment as factory within the meaning of Factories Act and, therefore, coverage of the establishment was proposed. In consonance of his finding, now there is no question for controverting the verdict of the Corporation for making the Applicant establishment amenable to the Act.

13. So far as suppression of record is concerned, the Applicant points out that the fact was noted by the Inspector who has visited the establishment. The letter dated 18th June 1987 is indicative fact from the Applicant's side which is supported by the visit note of the Inspector of the very date that the record has been destroyed by the white ants. This has a reference in the investigation report of the A.R.D. wherein he has mentioned that the record was infested due to white ants. It is very pertinent to note that by letter dated 27th May 1988, it was informed to keep the record ready for inspection at the premises. The authority has pointed out in his report that the record from 1st April 1984 to 31st March 1985 was put up but found that it was eaten by the white ants only in the middle and was able to be inspected as entries therein were in tacked. It is also mentioned that it was informed to him to keep all the records in whatever condition it is ready for inspection but he has not produced the same. It is pointed out that there was no evidence about the said complete destruction. Therefore, he has suggested to issue the order under section 45A. As stated earlier by this Court, by taking a recourse of the above said instances that the record pre 1983 could have been produced and it appears remotely that there are efforts of keeping back those documents pre 1983.

14. Exh. 19 again a note of the Inspector (Xerox copy). He has mentioned that the record for 1st April 1984 to 31st March 1985 wholly was eaten by the white ants in the middle. The report of the A.R.D. therefore, has to be valued than the report of the Inspector so far as non-production of record is concerned. This conclusion has to be reckoned in pursuance of the letter of the Applicant Exh. A to the main application dated 7th May 1988. By the said letter, it was informed to A.R.D. in para 3 page 2 that there is no provision to produce the record for second time when the earlier record has been produced. This expression of inability to produce the record also supports that there was an attempt to keep back some of the recording on the Applicant's side.

15. Learned Advocate Shri Mathew has relied on the observation in a case of *Employees State Insurance Corporation* V/s. *Malhoutra (K.L.) and another, 1962-II-LLJ-535.* Hon'ble his Lordship has observed that there is no statutory law or rule regarding the preservation of the records and books of accounts in the factory from its inception. There is no definite rule as well as to say that the factory is bound to preserve for so many years records and books of accounts. Considering the rule laid down and after testing the facts with the case in hand, it is transpired that the record which was maintained by the Applicant was not produced by him saying that the record has been eaten by white ants. What has been opposed by the Corporation is that of non-production of record in whatever condition it might be and not for non-maintenance of such record. In other words, once the record is maintained then the same has to be produced for verifications. Had it been the case that Corporation would have alleged against the Applicant that the record has not been maintained or preserved for long period, then the case would have been otherwise. The evidence of Shri Kheraj Exh. 15 is in the same line about the available records. However, while looking into the cross examination carried out in para 3, it is transpired that he is not in a position to give any correct answers so far as number of employees, wages and other aspects. Therefore, the authority which has finally formed its opinion was duty bound to call for the relevant records for coming to a proper conclusion. Even the Applicant himself has not expressed any opinion so far as pre 1978 period is concerned. Having regard to this aspect, the requirement of record, therefore, was atmost essential that too when the Corporation has desired to make the Applicant amenable. With all the discussion, I have given my finding to the point accordingly.

16. *Point No. 2.*—The legality and validity of the order under section 45A passed by the authority is challenged by the Applicant on various grounds. Firstly that the Corporation has fixed the contribution on *ad hoc* basis and secondly, the order passed is not a reasoned order. Learned Advocate Shri Mathew for the Applicant has relied on the observation in a case of *The Siemens Engineering and Manufacturing Co. of India Ltd.* Vs. *The Union of India and another AIR 1976 Supreme Court 1783.* The ratio therein is :—

"Where an authority makes an order in exercise of quacy judicial function, it must record its reasons in support of the order."

I have perused the order passed by the authority under the Act. He has referred to the positive assertion of employer's failing to produce the basic records. He has relied on the report of the Vigilence Officer and the Insurance Inspector's preliminary inspection report. The employment position in between May, 1983 to February, 1986 was reported to be 10. On this report, the factory was covered till January, 1987 and the period comprises was from 12th November 1978 to 31st March 1988. Admittedly, the order passed by the authority is by considering the say of both the sides and also that mentioning of failure to produce the record. However, it does reflect that there are no detail reasoning given by the authority for coming to the conclusion of covering the establishment. The order on the face of which appears to be monotonous. In a case of Siemens Engineering (supra) Hon'ble Apex Court has given rule that it is essential that administrative authorities and Tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear explicit reasons in support of the order made by them. Then alone, administrative authorities and Tribunals exercising quacy judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given any support of the order is like the principle of audi altram a basic principle of natural justice which must inform every quacy judicial process and this rule must be observed in its proper spirit and more prudence of compliance with it would not satisfy the requirement of law. I am in careful abidance with Hon'ble Apex Court. One can understand that for nonproduction of record, the authority under the Act may take such a view but the record which was put up before the authority and the authority is not expressing any opinion about the record or giving any reasons for coming to such conclusion is definitely not correct view and will not express the judicial mind of the authority concerned.

17. The order has also been challenged by the Applicant on the basis of *ad hoc* assessment under section 45A. As stated earlier, the Corporation has not explained as to why *ad hoc* assessment was made that too entire record for the period in between 1983 onwards was put up before the Corporation. In pursuance to that, I have referred to section 75(2) of the E. S. I. Act. Sub-clause 2(a) of section 75, it is laid down that subject to the provision of sub-section 2(a), following claims shall be decided by the Employees Insurance Court, namely :—

(a) Claim for recovery of contrubution from the principal employer.....

In pursuance of that, I have also referred to the observation of Hon'ble Delhi High Court in a case of *R. S. Ganesh Dass Dhomi Mal & Ors.* Vs. *Employees State Insurance Corporation, 1988-I-CLR-316.* The relevant observations are on the basis of the production of record and fixing the contribution on *ad hoc* basis. It is observed that :—

> "Once the record was seen, to my mind, it was imprative for the Corporation to make a final asseasement under section 75(2) (a) and not ad hoc assessment as provided under section 45A of the Act which does not seen to have been done in the present case."

The production and non-production of record in the instant case, therefore, arises so far as pre 1983 period is concerned. Admittedly, no record was produced. Therefore, that impugned period shall indicate that the employer was at fault in non-production of record. So far as further period is concerned, the assessment on the face of record appears to be without any cogent reasons.

18. Inspite of the documentary evidence on record, none of the witnesses of the Corporation has come forward to substantiate the various reports submitted by them or to establish the letter correspondence. Inspite of that, I have found that whatever available record has been put forth can be taken into consideration for colateral purpose and the record is nothing but the official correspondence *interse*. Therefore, the order passed by the A. R. D. has to be bifercated in the spans and the first span will be from 1973 to 1983 and second span is in between 1983 and 1988.

19. Learned Advocate Shri Daftary has all the while insisted on drawing the adverse inference for non-production of documents. It is his contention that the employer has evaded the provisions. It is pertinent to note that the record which was available and produced by the Applicant before the authority seems to have not verified and the Applicant has only cause to agitate the order under section 45A that the authority has unnecessarily fixed the contribution on *ad hoc* basis that too period from 1978 to 1983. Shri Mathew advocate for the Applicant has further pointed out that the provisions under section 45A can only be invoked when there is some material. While considering his submissions, in my view, Shri Mathew Advocate is concentrating on the period from December, 1978 onwards. The availability of material can only be when the record is produced. If the record is not produced or evaded, then the question of availability of material before the concerned authority cannot arise. In this regard, learned Advocate Shri Mathew has pointed out that the Inspector has to collect information for interviewing the workers and the absence of such mode, there is no provision for assuming the wages of the employees. He has further pointed out that under section 85 of the Act, the Corporation can prosecute for nonpayment of contribution but by overlooking the request, the Corporation cannot cover the establishment. Learned Advocate Shri Mathew is concentrating on the 3 letters issued by him and pointed out that there is no basis for any calculation. All the grounds which were raised are not taken into consideration in the order. On all these grounds, I have already observed that the order passed by the authority under the Act has no where expressed the reasons. Therefore, in the absence of true reports submitted by the Inspector and any other cogent documents, the conclusion of the authority based on unreasoned order will not sustain so far as period in between 1983 onwards is concerned. With this discussion, I hold that the order passed by the authority suffers partly on the ground of its being proper and valied. Hence, I answer point No. 2 accordingly.

20. *Point Nos. 3 and 4.*—The total amount claimed by the Corporation is Rs.74,712/- and interest thereon. In the earlier elaborate discussion, I have found that the computation of the amount for the period 1983 onwards is not correct because the order suffers for want of proper reasons to the extent of the subsequent period *i.e.* from 1983 onwards. In the result, the contention of the Applicant opposing coverage from 1978 onwards will not succeed till 1983 but will succeed from 1983 onwards, to the further period *i.e.* till 1988 as mentioned in the order Annexure 'C' to the application. With this discussion, I proceed to pass the following order :—

Order

(*i*) The application is partly allowed.

(*ii*) The order passed by the authority under section 45A dated 2nd February, 1989 is set aside.

(*iii*) It is declared that the Corporation is entitled for the contribution from 12th November, 1978 till December, 1982 only with interest at the rate of 6% p.a. from the date of the amount falling due till the date of filing of the present application in the Court.

(*iv*) The Corporation shall calculate the contribution for the above said period.

(*v*) The Applicant has already deposited 50% of the amount. The amount of contribution for the period in between November, 1978 till December, 1982 with interest shall be adjusted towards the said amount. The deficit amount if any, shall be paid by the Applicant within 6 weeks. If the amount already deposited is excess than the claim, then the excess amount be refunded to the Applicant by the office forthwith.

No order as to costs.

P. B. SAWANT,
Judge,
Employees' Insurance Court, Mumbai.

Dated the 29th January 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 1st February 2003.

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IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

O - 3

BEFORE SHRI S. M. RATNAKAR, MEMBER

MISC. APPLICATION (ULP) No. 69 of 1995.—Engineering Workers Union, 4, Esmail Mansion, 188, Dr. Ambedkar Road, Dadar, Bombay 400 014.—*Applicant—Versus*—(1) M/s. Joseph Leslie & Co., Leslico House, 87-C, Bhavani Shankar Road, Dadar, Bombay 400 028, (2) Mrs. Carol Leslie Roy, Partner, M/s. Joseph Leslie & Co., Leslico House, 87-C, Bhavani Shankar Road, Dadar, Bombay 400 028, (3) Mrs. Windi Leslie Pareira Partner, M/s. Joseph Leslie & Co., Leslico House, 87-C, Bhavani Shankar Road, Dadar, Bombay 400 028.—*Opponents.*

CORAM.— Shri S. M. Ratnakar, Member.

Appearances.— Shri B. K. Kavar for the Applicant.

Shri M. V. Bhat, Advocate for Opponents.

Order

1. By this application, the Applicant union has prayed for issuance of certificate to the Collector of Bombay to recover an amount of Rs. 11,62,544.25 P. as land revenue under section 50 of the M.R.T.U. and P.U.L.P. Act, 1971.

2. It is alleged that the Opponent No. 1 is an old company engaged in manufacture of various types of industrial safety equipments. The Opponent Nos.2 and 3 are the partners of the Opponent No. 1. The wages and other benefits payable to the workmen are governed by the settlement signed by the Opponent No. 1 with the Applicant union from time to time. The Opponent No. 1, however, denied the wages and service conditions as per the settlements dated 5th July 1971, 1st June 1977, 12th June 1983, 16th July 1985, 26th October 1988 and 17th March 1992. The Opponents were treating some of the workmen as if employed by the contractors while in fact, such workmen were doing the work of the Opponent No. 1 only. The 12 workmen who are denied the wages and other benefits shown in para 1 of application were/ are denied the wages by the Opponents.

3. The Applicant union filed Complaint (ULP) No. 993 of 1991 before the Industrial Court, Bombay under M.R.T.U. and P.U.L.P. Act for directions to the company to make the above listed workmen in para 1 of the application for payment of arrears and wages as per the settlements applicable for the workmen employed by the company. The said complaint was decided on merits on 28th July 1995 and the following order came to be passed in the said complaint :—

> "Complaint of the Complainant is hereby allowed. It is hereby declared that the Respondent company No. 1 has committed unfair labour practice under items 6, 9 and 10 of schedule IV of the M.R.T.U. and P.U.L.P. Act.
>
> The Complainants are entitled to get the wages as per the provisions of the Minimum Wages Act and agreements/settlements and also benefits of bonus, P. F. etc. like regular employees of the Respondent company. The Respondent company are directed to cease and desist such unfair labour practice in future. No order as to costs."

The certified copy of the said order is annexed as Annexure 'A' to this application. The Applicant union issued letters dated 23rd August 1995 and 14th September 1995 to emplement the order of the Industrial Court. The letter dated 1st September 1995 issued by the Opponent No. 1 shows that they are not ready to comply with the order passed by the Industrial Court. It is, therefore, prayed that the amount shown in para 10 of the application as regards each workmen amounting to Rs. 11,62,544.25 p. be directed to be paid to the said workmen or the certificate be issued to the Collector of Bombay for the recovery of the above amount as land revenue.

4. The Opponent contested the application by written statement at Exh. C-6. The allegations made in the application are denied. It is denied that the Applicants are the workmen of the Opponent No. 1. It is contended that the Opponent have filed Writ Petition against the order of the Industrial Court in the High Court at Bombay. It is contended that the Applicant cannot claim the interest the application for recovery of the amount claimed in view of the contention raised in the written statement at Exh. C-6 is liable to be rejected.

5. The Opponents thereafter filed application at Exh. C-8 contending that the above application is filed under section 50 by the Applicant. It is contended that, however, in Writ Petition No. 6479 of 1995 reported in 2002-III-CLR-3, Hon'ble High Court has set aside the said order. It is therefore, prayed that in view of the said order, the application filed by the Applicant is liable to be dismissed.

6. The Applicant did not file any say to this application.

7. Heard Shri M. V. Bhat Advocate for the Opponents and union representative Shri Kavar for the Applicant. Shri Bhat advocate made submission that as the complaint itself is dismissed by the Hon'ble High Court, the Applicant union and its members are not entitled to the reliefs claimed in this application. The union representative, however, made submissions that in the reported judgment, it is mentioned that the Petition is dismissed with no order as to costs. Therefore, the application can be proceeded.

8. Following points arise for my determination and my findings thereon are as under :—

(1) Whether the application for recovery of the amount claimed in the application is maintainable in law ?	Negative
(2) What order ?	As per final order.

Reasons

9. It is true that in the reported judgement in a case of *M/s. Joseph Loslie & Co*. V/s. *Engineering Workers Union and others, 2002-III-CLR-3*, it is observed in last para in last 2 lines that the petition is dismissed with no order as to costs. However, the Opponents have submitted a xerox copy of the judgment in Writ Petition No. 6479 of 1995 dated 9th August 2002 and the said copy produced with application Exh. C-11 shows that the said order dismissing the Writ Petition later on corrected on 13th September 2002 by his Lordship Hon'ble Justice Shri Kochar and the Petition held succeeds. The rule is made absolute. No order as to costs. In the said judgment, it is specifically mentioned by his Lordship that "I have corrected the last 2 lines as above." The submission, therefore, made by Shri Bhat Advocate for the Opponents that the application for recovery of the amount claimed in the application is liable to be dismissed can be said legal and proper. The representative of the union has not made any statement that the judgment in Writ Petition No. 6479 1995 has been challenged by him before Hon'ble Apex Court. Considering the said fact, I hold that as the original Complaint (ULP) No. 993 of 1991 is dismissed by setting aside the total judgment and order of the Industrial Court, the relief claimed in this application cannot be granted in favour of the Applicant union. I, therefore, answer this point accordingly and pass the following order :—

Order

(*i*) The application is hereby dismissed.

No order as to costs.

S. M. RATNAKAR,
Member,
Industrial Court, Mumbai.

Dated the 28th January 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
dated the 30th January 2003.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 139 of 1998.—Manik Vasant Deshpande, (After marraige Sou. Snehal Satish Dandage), R/o. Shelke Wada, 2200, B-Ward, Mandalik Galli, Mangalwar Peth, Kolhapur.—*Petitioner—Versus*—(1) Executive Engineer, Laghu Jal Sinchan, Zilla Parishad, Kolhapur—*Respondent No. 1*, (2) The Chief Executive Officer Zilla Parishad, Kolhapur.—*Respondent No. 2.*

In the matter of Revision U/s. 44 of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri A. G. Pansare, Advocate for the Petitioner.

Shri A. T. Upadhye, Advocate for Respondents.

Judgment

This is a Revision by original Complainant challenging legality of judgment and order passed in Complaint (ULP) No. 290/92 by Labour Court, Kolhapur, whereby relief of reinstatement and other consequential benefits is refused by dismissing the complaint.

2. Admittedly, present Petitioner (hereinafter referred to as the Complainant) started working under present Respondent (hereinafter referred to as the Zilla Parishad) as a clerk on daily wages from 22nd February 1983 till her services were terminated by order dated 31st August 1987 with effect from 1st September 1987. She then filed Complaint (ULP) No. 44/89 before Labour Court challenging the termination. It was allowed and the Zilla Parishad was directed to reinstate her with continuity of service and back wages. The Zilla Parishad challenged said decision by preferring Revision Application (ULP) No. 19/1990 before this Court, wherein, original decision was substantially confirmed, with some modification regarding payment of back wages. The Zilla Parishad then preferred Writ Petition No. 1686 of 1990 before the Hon'ble High Court which also came to be dismissed on 27th September 1991. The Zilla Parishad then reinstated the Complainant as Junior Assistant on daily wage basis in the Department of Ground Water Survey and Development Agency on temporary basis by order dated 30th November 1991. It then retrenched the Complainant by order dated 21st July 1992.

3. It is case of the Complainant that the she put services of 8 to 9 years, however, her scale was not fixed and was continued on the starting basic pay of Rs. 950/- per month only. The Zilla Parishad was annoyed due to all previous decisions in her favour and hence vindictively terminated her services under the grab of retrenchment. In fact, the compensation offered was inadequate, juniors are, retained in services and there is violation of provisions of Sec. 25 F and 25 G of the I. D. Act. Besides, no seniority list was published prior to retrenching her and hence the termination is an unfair labour practice under item 1(a), (b), (d) and (f) of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

4. The Zilla Parishad filed its written statement at Exh. 10 contending that order of Hon'ble High Court was implemented, the Complainant was reinstated and posted on the original post and was paid full back wages. Thereafter, her services were not required and hence is terminated by following due process of law. In fact, the Complainant was the only employee in the category of Junior Assistant, even then, a seniority list was published on the notice board and then was retrenched being the junior most. Further more, she was offered notice pay and retrenchment but the refused and hence it was tendered by registered post but it too was refused. Government of Maharashtra has issued a circular directing termination of services of daily wages, there was no work which could be provided to the Complainant and hence she was retrenched. Thus, the Zilla Parishad justified its action and prayed for dismissal of the complaint.

5. Considering rival pleadings, learned Labour Court framed issued at Exh. 15 and the parties went to the trial. Both parties adduced documentary and oral evidence.

6. Learned Labour Court on perusal of evidence and hearing both parties, held that the retrenchment was *bonafide* one and the Complainant refused to accept retrenchment compensation. It then held that no juniors are either retained or appointed in place of the Complainant and the seniority list was duly published. Finally, it held that there is no unfair labour practice and then dismissed the complaint by order dated 13th May, 1998. The same is challenged in this revision.

7. I heard both Advocates. Considering rival submissions following points arise for my determination :—

(*i*) Whether impugned decision holding that Complainant's termination is not an unfair labour practice, is justifiable ?

(*ii*) What order ?

8. My findings on above points are as under :—

(*i*) Yes.

(*ii*) The Revision Application is dismissed.

Reasons

9. This being a revision under Sec. 44 of the M.R.T.U. and P.U.L.P. Act it is not necessary to scrutinise rival contentions meticulously. The only material question is whether documents on record are incapable of supporting impugned decision ? In other words, whether impugned decision is perverse or justifiable ?

10. There is no dispute about previsious dicisions of Labour Court, this Court, Hon'ble High Court and implementation thereof. Shri Pansare, learned Advocate representing the Complainant argued, at the outset, that the Zilla Parishad has not obtained permission of the Govt. to retrench the Complainant as contemplated under Chapter-V-B of the I. D. Act. Besides, the seniority list was not published seven days prior to the retrenchment as provided under Rule-81 of the Industrial Rules (Bombay Rules). Other employee namely Shri Chougule who is junior to the Complainant is appointed in her place. The Zilla Parishad has discriminated between the permanent and temporary employees. Alleged seniority list which is said to be published, is incomplete as it contains name of Complainant only. No evidence is produced to show that now no work is available. But the Labour Court misread all facts and recorded a perverse finding.

11. Shri Upadhya, learned Advocate representing the Zilla Parishad replied that the Complainant herself has admitted that she has not seen the seniority list and refused the retrenchment compensation. Employee Shri Chougule is transferred due to closure of rehabilitation department and is not junior to the Complainant. The Complainant alone was working in the category of Junior Asstt. and legally retrenched for want of work. As such, the Labour Court rightly dismissed the complaint.

12. The Complainant has admitted in the cross-exam. that she is paid back wages after order of Hon'ble High Court. She has stated in exam. in chief that she was again terminated *w.e.f.* 21st July, 1992 as there was no work. Zilla Parishad's witness has also deposed in detail as to how and under what circumstances the Complainant came to be retrenched. Consequently, it cannot be accepted that retrenchment is by way of victimisation. On the contrary, the same is *bonafide* one.

13. Chapter V-B of the I. D. Act is applicable to the industrial establishments as defined under Sec. 25-K of the I. D. Act. Sec. 25-L of the I. D. Act defines the term 'industrial establishment' for the purpose of chapter V-B. It is mainly applicable to factories, mine and plantation. As such, I am unable to accept the same is applicable to Zilla Parishad and prior permission of the Govt. was necessary. Besides, such plea was not taken before the Labour Court.

14. As regards publication of seniority list, there is no material evidence to show that as to who where other employees covered under the category of Junior Asstt. In fact, the Complainant has not seen the seniority list. Eventually, plea of non-publication of seniority list and its incorrectness does not stand to reason. Zilla Parishad's witness has deposed that the Complainant was junior most and nobody is appointed after her retrenchment. I therefore, find that seniority list is properly published and the junior most employee is retrenched. As regards employment of Shri Chougule, his transfer order dated 31st May, 1994 says that he is transferred due to closure of rehabilitation department. Consequently, learned Labour Court has rightly held that he is not appointed afresh and cannot be said to be junior to the Complainant.

15. The Complainant has herself replied in the cross-exam. that retrenchment compensation was tendered but she refused as the same was contrary to decision of Hon'ble High Court. Thus, tender of requisite retrenchment compensation has come on the record. Learned Labour Court has rightly calculated the compensation which was tendered and hence, plea of inadequate compensation fails.

16. In the background of above discussion and observations, I find that learned Labour Court has rightly dismissed the complaint holding that there is no unfair labour practice while terminating/retrenching the Complainant. Impugned decision no where spells of arbitrariness or perversity. On the contrary, there is every substance in its reasoning. Accordingly, I answer point No. 1 in the affirmative and pass following order :—

Order

(*i*) The Revision Application is dismissed.

(*ii*) No order as to costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 11th February 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

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BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

APPEAL (MMH) No. 1 of 2002.—Mr. Ramesh Shantilal Soniminde, Nav Maharashtra Chakan Oil Mills Ltd., E-6, MIDC., Kupwad, Dist. Sangli.—*Appellant*—*Versus*—Shri U. B. Mulani, Inspector Under MMH Act, Sangli Miraj Mathadi and Unprotected Labour Mandal, Sangli, Vasant Market Yard, Sangli.—*Respondent.*

In the matter of Appeal u/s. 17C of the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969.

CORAM.— Shri. C. A. Jadhav, Member.

Appearances.— Mr. & Mrs. S. S. Mutalik, Advocate for the Appellant.

Shri. D. N. Patil, Advocate for the Respondent.

Judgment

This is an Appeal purporting to be under section 17C of the Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969 (hereinafter referred to as the 'Madhadi Act') by original Accused challenging legality of order dated 28th June 2002 passed below Exh.U-1 in Criminal Complaint (MMH) No. 15/95 by Labour Court, Sangli, whereby previous order dated 25th November 1999 staying trial of the complaint till decision of reference pending before the Secretary of Government of Maharashtra is vacated.

2. Admittedly, present Respondent is appointed as an Inspector (hereinafter referred to as the Complainant) under the Mathadi Act. He filed above Criminal Complaint against the Petitioner (hereinafter referred to as the Accused) on 17th June 1995 alleging commission of offences under the Mathadi Act and other incidental provisions. The Accused then appeared on 6th December 1995 and was released on personal bond of Rs. 200. The Accused then pleaded not guilty on 10th September 1996. The Accused came with a defence that the Mathadi Act is not applicable, has made a reference under section 5 of the Mathadi Act to the Government of Maharashtra for that purpose and the same is pending. The Accused then made in application Exh. C-20 to stay the trial till decision of the Reference. Learned Labour Court allowed the same on 25th November 1999 and stayed further trial till decision of the Reference.

3. Learned Labour Court, then made an order on 14th February 2002 directing the Accused to produce relevant record regarding the Reference and *bonafide* attempts for its earlier disposal. However, the Accused failed to produce concerned documents, if any. Eventually, learned Labour Court passed an order on 28th June 2002 vacating the stay and directed that the Criminal complaint shall proceed further. The same is challenged in this Appeal.

4. I heard both Advocates. Considering rival submissions, following points, arise for my determination :—

(*i*) Whether impugned order dated 28th June, 2002 vacating stay order dated 25th November 1999, is legal and proper ?

(*ii*) What order ?

5. My findings on above points are as under :—

(*i*) Yes.

(*ii*) The Appeal is dismissed.

Reasons

6. I must state at the outset that section 17C of the Mathadi Act provides that an Appeal shall lie in this Court against a conviction by a Labour Court, against an acquittal by a Labour Court and for enhancement of sentence awarded by the Labour Court. Impugned order is not covered by respective appellable orders. As such the very maintainability of the appeal is in question. However, no arguments were advanced by either Advocates regarding maintainability of the Appeal. But they argued on merits of empugned order. I, therefore, do not wish to enter into controversy regarding maintainability of the Appeal.

7. Section 5 of the Mathadi Act is as under :—

"If any question arises whether any scheme applies to any class of unprotected workers or employers, the matter shall be referred to the State Government and the decision of the State Government on the question, which shall be taken after consulting the Advisory Committee under section 14, shall be final."

8. Mrs. Mutalik, learned Advocate representing the Appellant Accused submitted that the workers employed by the Accused as well as employed through the Contractors are protected under other Labour Acts, provisions of Mathadi Act are not applicable to the establishment of Accused and, therefore, reference was made on 3rd May 1995 to Government of Maharashtra. The same is pending and no decision, in either way is communicated to the Accused. If the Advisory committee ultimately holds that Mathadi Act is not applicable to establishment of Accused, then the original complaint will not be maintainable. Considering all such material aspects, the Labour Court stayed further trial by order dated 25th November 1999. She further submitted that meetings of the Advisory Committee are not held regularly and hence no decision is taken by the committee on reference. However, the Accused is not responsible for the same. As such, there was no propriety in vacating the stay. She further explained that question of applicablity of the Mathadi Act cannot be decided by the Labour Court.

9. Shri D. N. Patil, learned Advocate representing the Respondent-Accused replied that the Government has already replied by letter dated 19th May 1994 that Mathadi Act is applicable and directed the Accused to have registration under the same. Even then, false references are made. As such the Labour Court was well justificable in vacating the stay.

10. It will be premature at this stage to decide as to whether the Mathadi Act is applicable to the establishment of Accused as the Criminal Complaint is pending before the Labour Court. Section 1 of the Mathadi Act states about its application and commencement. Section 2(*9*) defines the term "scheduled employment" and section 2(*11*) "unprotected workman". The schedule is appended to the Mathadi Act. In my judgment, therefore, learned Labour Court has every jurisdiction to decide as whether provisions of Mathadi Act are applicable to the Accused and then alleged commission of offence thereunder. As per legal provisions, learned Labour Court has every jurisdiction to decide applicablility of the Mathadi Act. Besides, section 5 of the Mathadi Act neither expressly nor impliedly bar jurisdiction of the Labour Court to decide the complaint merely on the ground that a reference is made to Advisory Committee. It is further seen that plea of the Accused is recorded. There was no material on record to show that the Reference made to Advisory committee was bonafidely pursued for its earlier disposal. Even otherwise, the Accused can raise all his defences before the Labour Court and the Labour Court has every jurisdiction to decide the same. The complaint is of the year 1995 and is unnecessarily pending for 8 years. In such circumstances, learned Labour Court has rightly passed impugned order vacating earlier order staying further trial of the complaint. I do not find any perversity or arbitrariness in the same. On the contrary, it appears that it extended reasonable opportunity to the Accused to pursus the Reference and obtain requisite orders from the Advisory Committee. Accordingly, I answer point No. 1 in the affirmative and pass following order :—

Order

(*i*) The Appeal is dismissed.

(*ii*) R. & P. be sent to Labour Court and the parties shall appear there on 12th March, 2003.

(*iii*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 28th February, 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

APPEAL (MMH) No. 2 of 2002.—Manager, Nav Maharashtra Portland Cement Industries, E-5, MIDC, Kupwad, Dist. Sangli.—*Appellant*—*Versus*—Shri V. R. Mirajkar, (Inspector Under MMH Act), Sangli Miraj Mathadi and Unprotected Labour Mandal, Sangli, Vasant Market Yard, Sangli.—*Respondent.*

In the matter of Appeal u/s. 17C of the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Mr. & Mrs. S. S. Mutalik, Advocate for the Appellant.

Shri D. N. Patil, Advocate for the Respondent.

Judgment

This is an Appeal purporting to be under section 17C of the Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969 (hereinafter referred to as the 'Madhadi Act') by original Accused challenging legality of order dated 28th June 2002 passed below Exh.U-1 in Criminal Complaint (MMH) No. 14/95 by Labour Court, Sangli, whereby previous order dated 25th November 1999 staying trial of the complaint till decision of reference pending before the Secretary of Government of Maharashtra is vacated.

2. Admittedly, present Respondent is appointed as an Inspector (hereinafter referred to as the Complainant) under the Mathadi Act. He filed above Criminal Complaint against the Petitioner (hereinafter referred to as the Accused) on 12th June 1995 alleging commission of offences under the Mathadi Act and other incidential provisions. The Accused then appeared on 21st October 1995 and was released on personal bond of Rs. 200. The Accused then pleaded not guilty on 17th August 1996. The complaint then proceeded further. The Complainant then examined himself on 6th November 1998. The Accused came with a defence that the Mathadi Act is not applicable, has made a reference under section 5 of the Mathadi Act to the Government of Maharashtra for that purpose and the same is pending. The Accused then made in application (Exh. 17) to stay the trial till decision of the Reference. Learned Labour Court allowed the same on 25th November 1999 and stayed further trial till decision of the Reference.

3. Learned Labour Court, then made an order on 14th February 2002 directing the Accused to produce relevant record regarding the Reference and *bonafide* attempts for its earlier disposal. However, the Accused failed to produce concerned documents, if any. Eventually, learned Labour Court passed an order on 28th June 2002 vacating the stay and directed that the Criminal complaint shall proceed further. The same is challenged in this Appeal.

4. I heard both Advocates. Considering rival submissions, following points, arise for my determination :—

(*i*) Whether impugned order dated 28th June 2002 vacating stay order dated 25th November 1999, is legal and proper ?

(*ii*) What order ?

5. My findings on above points are as under :—

(*i*) Yes.

(*ii*) The Appeal is dismissed.

Reasons

6. I must state at the outset that section 17C of the Mathadi Act provides that an Appeal shall lie in this Court against a conviction by a Labour Court, against an acquittal by a Labour Court an enhancement of sentence awarded by the Labour Court. Impugned order is not covered by respective appellable orders. As such the very maintainability of the appeal is in question. However, no arguments were advanced by either Advocates regarding maintainability of the Appeal. But they argued on merits of impugned order. I, therefore, do not wish to enter regarding controversy regarding maintainability of the Appeal.

7. Section 5 of the Mathadi Act is as under :—

"If any question arises whether any scheme applies to any class of unprotected workers or employers, the matter shall be referred to the State Government and the decision of the State Government on the question, which shall be taken after consulting the Advisory Committee under section 14, shall be final."

8. Mrs. Mutalik, learned Advocate representing the Appellant-Accused submitted that the workers employed by the Accused as well as employed through the Contractors are protected under other Labour Acts, provisions of Mathadi Act are not applicable to the establishment of Accused and, therefore, reference was made on 3rd May, 1995 to Government of Maharashtra. The same is pending and no decision, in either way is communicated to the Accused. If the Advisory committee altimately holds that Mathadi Act is not applicable to establishment of Accused, then the original complaint will not be maintainable. Considering all such material aspects, the Labour Court stayed further trial by order dated 25th November, 1999. She further submitted that meetings of the Advisory Committee are not held regularly and hence no decision is taken by the committee on reference. However, the Accused is not responsible for the same. As such, there was no propriety in vacating the stay. She further explained that question of applicability of the Mathadi Act cannot be decided by the Labour Court.

9. Shri D. N. Patil, learned Advocate representing the Respondent-Accused replied Government has already replied by letter dated 19th May, 1994 that Mathadi Act is applicable and directed the Accused to have registration under the same. Even then, false references are made. As such the Labour Court was well justificable in vacating the stay.

10. It will be premature at this stage to decide as to whether the Mathadi Act is applicable to the establishment of Accused as the Criminal Complaint is pending before the Labour Court. Section 10 of the Mathadi Act states about its application and commencement. Section 2(*9*) defines the term "scheduled employment" and section 2(*11*) interpreted workman. The schedule is appended to the Mathadi Act. In my judgment, therefore, learned Labour Court has every jurisdiction to decide as whether provisions of Mathadi Act are applicable to the Accused and then alleged commission of offence thereunder. As per legal provisions, learned Labour Court has every jurisdiction to decide applicablility of the Mathadi Act. Besides, section 5 of the Mathadi Act neither expressly nor impliedly bar jurisdiction of the Labour Court to decide the complaint merely on the ground that a reference is made to Advisory Committee. It is further seen that plea of the Accused is recorded and the Complaint's part-heard. There was no material on record to show that the Reference made to Advisory committee was bonafidely pursued for its earlier disposal. Even otherwise, the Accused can raise all his defences before the Labour Court and the Labour Court is every jurisdiction to decide the same. However, the complaint is of the year 1995 and is unnecessarily pending for 8 years. In such circumstances, learned Labour Court has rightly passed impugned order vacating earlier order staying further trial of the complaint. I do not find any perversity or arbitrariness in the same. On the contrary, it appears that it extended reasonable opportunity to the Accused to pursus the Reference and obtain requisite orders from the Advisory Committee. Accordingly, I answer point No. 1 in the affirmative and pass following order :—

Order

(*i*) The Appeal is dismissed.

(*ii*) R. & P. be sent to Labour Court and the parties shall appear there on 12th March, 2003.

(*iii*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 28th February 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 197 of 1999.—Shri Navjeevan Sahakari Dudh Vyavsaik Sanstha Limited, Patane, Post Save, Taluka Shahuwadi, District Kolhapur, through its Chairman and Secretary.—*Petitioner—Versus*—Shri Eknath Bapu Patil, At Patane, Post Save, Taluka Shahuwadi, District Kolhapur.—*Respondent.*

In the matter of Revision u/s. 44 of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Appearances.— Shri D. N. Patil, Advocate and B. D. Mondkar Advocate for the Petitioner.

Shri V. D. Narvekar, Advocate for the Respondent.

Judgment

This is a Revision by Original Respondent an Employer challenging legality of order passed below Exh. U-2 complaint (ULP) No. 255 of 1999 by Labour Court, Kolhapur, whereby he is directed to allow original Complainant secretary to resume duties by keeping acceptance of his resignation in abeyance, till decision of main complaint.

2. Admittedly, present Respondent (hereinafter referred to as the Complainant) was in employment of present Petitioner (hereinafter referred to as the Society) as a Secretary. He filed above complaint alleging unfair labour practice under item 1(a), (b), (d) and (f) of Sch. IV of the MRTU and PULP Act, *inter alia*, contending that the Society and its Directors obtained forceable resignation on 17th August 1999 from him and three other employees. In fact, he has stated in his resignation that the same is given as per directions of the Society. As such, the resignation is in voluntary one. Forceable resignations of other three employees are not taken on record and they are still working with the Society. However, it was resolved in meeting dated 9th August 1999 to accept his forceable resignation and it is an unfair labour practice. Hen then claimed reinstatement in service with continuity of service and full back wages. He also made an interim Application (Exh. U-2) to temporary allow him to be join duties, till decision of main complaint.

3. The Society filed its written statement at Exh. C-12 contending that the resignation was voluntary duly accepted in the meeting dated 9th August 1999 and hence there is no unfair labour practice. Thus, the Society justified its action and prayed for dismissal of interim application as well as the complaint.

4. The Complainant produced zerox copy of notice of meeting dated 9th August 1999 whereas, the Society zerox copy of the disputed resignation. Learned Labour Court, after hearing both parties observed that contents in the resignation that the same is given as per directions of the Society is *prima facie*, indicative of involuntariness. It also observed that subject *i.e.* "discussions on resignation taken form the employees" coroborates Complainant's plea. It then held that a *prima facie* case of an unfair labour practice is made out and allowed the interim application (Exh. U-2) as above, *vide* order dated 13th October 1998. The same is challenged in this Revision.

5. I heard both sides, Considering rival submissions, following points, arise for my detrmination.

(*i*) Whether impugned order warrants interference as this *prima facie* stage?

(*ii*) What order ?

6. My findings on above points are as under :—

(*i*) No.

(*ii*) The Revision Application is dismissed.

Reasons

7. This being a Revision under section 44 of the M.R.T.U. and P.U.L.P. Act, it is not necessary to scruitinise rival contentions meticulously. The only material question as to whether documents on record are incapable of supporting impugned order ? In other words, whether impugned order is perverse or justifiable ?

8. It is stated in the disputed resignation that the same is given as per directions of the society. Thus, *prima facie*, it has an element of involuntariness. Besides, drafting of the subject of Society's meeting dated 9th August 1999 is self eloquent. The subject is "discussions regarding resignation taken from the employee". Besides, the Complainant is nowhere communicated about acceptance of his resignation. Advocate Shri Manolkar argued that the Complainant himself wrote Proceeding Book of the meeting and thus was aware of the acceptance of the resignation. I am not impressed by his arguments. Had it been so, it ought to have resolved that no communication be sent to the Complainant. Besides, an Application (Exh. C-9) is made in this Revision that the Society is willing to allow the Complainant on duties but he is unwilling to join. Apart from merits and de-merits thereof, *prima facie*, it appears that the society is now willing to allow the Complainant to join duties. In such circumstances, I do not find any perversity in the impugned order and no intererence is called for. Accordingly, I answer point No. 1 in the negative and pass following order :—

Order

(*i*) The Revision Application is dismissed.

(*ii*) R. & P. be sent to Labour Court immediately and the parties shall appear there on 28th February 2003.

(*iii*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 11th February 2003.

Asstt. Registrar,
Industrial Court, Kolhapur.

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BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

APPEAL (BIR) No. 2 of 2002.—Shri Machindra Hariba Kambale, At Aatigre, Tal. Hatkanagale, District Kolhapur.—*Appellant*—*Versus*—The Primary Teachers Co-op. Bank Ltd. 1031, C/2, Shahupuri, 'E' Kolhapur, (through the Manager).—*Respondent.*

In the matter of an Appeal under section 84 of the BIR Act, 1946.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri A. G. Pansare, Advocate for the Appellant.

Shri A. D. Patil, Advocate for the Respondent.

Judgment

This is an appeal under section 84 of the BIR Act by original Respondent employee challenging legality of order passed below Exh. U-7 in Application (BIR) No. 1/2002 by Labour Court, Kolhapur, whereby relief of withdrawing his suspension order till disposal of main, application is rejected.

2. Admittedly, present Appellant (hereinafter referred to as the employee) is working as a Branch Manager under present Respondent (hereinafter referred to as the Bank). He is a protected employee. The Bank served a chargesheet dated 2nd June 2001 upon him alleging certain misconducts. He was not suspended pending enquiry of the chargesheet. Then an enquiry took place. The Enquiry Officer submitted his reported dated 29th August 2001 that all charges levelled against him are proved. The employee then submitted his explanation dated 19th September 2001 to the Report of the Enquiry Officer. The Bank then passed Resolution No. 431 in meeting dated 19th January 2002 of its Board of Directors that proved misconducts are serious, employee's past record is not clean and has thus lost confidence of the Bank. It was further resolved that employee's service be terminated by paying wages of one month in lieu of notice. It was also made clear that employee's dismissal will come into force after permission of Labour Court, Kolhapur. The Bank then suspended the Complainant pending permission of the Labour Court and decided to pay 50% wages as suspension allowance till permission of the Labour Court. Accordingly, order dated 21st January 2002 was served upon the employee.

3. The Bank then filed above Application on 21st January 2002 under section 101(2-A) of the BIR Act before Labour Court, Kolhapur seeking permission to dismiss the employee. The Bank prayed that a preliminary issue regarding legality of the enquiry be framed and be permitted to lead evidence if findings are held to be perverse. Notice thereof was served upon the employee. He did not file reply to the main application (Exh. C-1) on the first date of his appearance but filed an application (Exh. U-7) under section 119-D of the BIR Act.

4. It is case of the employee that he is active leader of Kolhapur District Bank Employees Union. His Union filed Complaint (ULP) No. 41/2001 before Industrial Court, Kolhapur wherein an interim order is passed restraining the Bank from recruiting any employees. As such, the Bank is much annoyed. It is alleged that his suspension is malafide, illegal, vindictive and practically amount to dismissal. Finally, he prayed to stay his suspension, till decision of main application.

5. The Bank objected the application *vide* reply Exh. C-12 contending that employee's suspension has no nexus with the complaint filed by the Union before the Industrial Court, Kolhapur. Other office bearers of the Union and members are in employment and working harmoniously. The Complainant was suspended pending his enquiry, however, the charges were proved in the enquiry. Considering seriousness of proves charges, he is suspended pending permission of the Labour Court. It is further contended by the Bank that the employee has to file separate proceeding to ventilate his grievances, however, he is not terminated but simply suspended. Finally, the Bank justified its action and prayed for dismissal of interim application (Exh. U-7).

6. Both parties filed documentary evidence in support of their contentions. Learned Labour Court, after hearing both parties, observed that provision under section 33(*2*) of the I. D. Act is analogous to section 101(2-A) of the BIR Act. As such, proposition of law relating to section 33(*2*) of the I. D. Act are applicable and hence the suspension order cannnot be withdrawn. It also observed that the Complainant is suspended and not terminated. Finally, it rejected the interim application (Exh. U-7) by order dated 19th July, 2002. The same is challenged in this appeal.

7. I heard both Advocates at length. Considering rival submissions, following points, arise for my detrmination.

(*i*) Whether present Appeal is miantainable under section 84 of the BIR Act?

(*ii*) Whether impugned order suspending the employee pending the application for permission, is justifiable ?

(*iii*) What order ?

8. My findings on above points are as under :—

(i) Yes.

(ii) Yes.

(*iii*) The Appeal is dismissed.

Reasons

9. *Point No. 1* : Admittedly, the Bank has filed main Application U/s. 101 (2-A) of the BIR Act. The employee then filed interim application (Exh. U-7) under section 119-D of the BIR Act which provides that the Labour Court may pass such interim order as it may consider just and proper. In my judgment therefore, either of the parties can file an application under section 119-D of the BIR Act. Consequently, it cannot be accepted that the employee must file separate proceeding to ventilate his grievance. His application (Exh. U-7) was maintainable under section 119-D of the BIR Act.

10. Shri Patil, learned Advocate representing the Bank argued that impugned order is passed in a proceeding under section 101(2-A) for under section 119-D of the BIR Act. Section 84 of the BIR Act does not contemplate orders under both these sections which can be challenged in an appeal. Eventually, the employee ought to have filed a Revision Application under section 85 of the BIR Act.

11. Advocate Shri Pansare, representing the employee replied that section 101(2-A) of the BIR Act speaks of a provision. Likewise, section 119-D clarifies powers to pass interim order. However, jurisdiction is conferred upon a Labour Court under section 78 of the BIR Act to decide dispute regarding propriety or legality of an order passed by an employer. Eventually, impugned order must be held as passed while exercising powers under section 78 of the BIR Act and hence the same can be well challenged in an Appeal under section 84 of the BIR Act.

12. There is merit in argument of Advocate Shri Pansare. The Labour Court has jurisdiction to decide propriety or legality of order passed by an employer. Section 101(2-A) is under chapter XVI *i.e.* of Panalties. As such, impugned order must be held to be under section 78 of the BIR Act and thus can well be challenged as provided under section 84 of the BIR Act by way of an Appeal. I, therefore, hold that the appeal is maintainable. Accordingly, I answer point No. 1 in the affirmative.

13. Advocate Shri Pansare argued, in the second phase, that the Bank has not applied for permission to dismiss the employee but practically for confirmation of its decision. Prayer cause 11 of main application claims for declaration that order of dismissal is justifiable. The suspension is practically in the nature of punishment.

14. Advocate Shri Patil, replied that permission under section 101(2-A) of the BIR Act cannot be sought unless an employer takes decision of punishment. Otherwise permission thereof cannot be prayed. Punishment of dismissal is subject to permission of Labour Court which has every right to decide legality and propriety thereof.

15. Bank's reply Exh. C-12 states that the employee is not terminated but suspended. The Bank has applied for permission to dismiss the employees. In such circumstances, *prima facie*, it cannot be accepted that the bank is simply praying for confirmation of its decision. As such, arguments of Advocate Shri Pansare, are unacceptable.

16. Advocate Shri Pansare further argued that the Bank has no certified Standing Orders and is therefore, governed by Model Standing Orders applicable to banking industry. Rule 22(5) thereof provides suspension pending Completion of an enquiry and there is no provision to

suspend an employee till permission of Labour Court under section 101 (2-A) of the BIR Act to dismiss him. Thus, the Bank has no statutory right to suspend the Complainant after completion of the enquiry. Plea of loss of confidence is totally after though as it is nowhere alleged in the chargesheet that alleged misconduct lost confidence of the Bank. He further argued that provisions under section 33(2) of the I. D. Act cannot be applied here as no proceeding in respect of industrial dispute is pending between the parties. Conquently it cannot be accepted that said section is anologous to section 101(2-A) of the BIR Act. Besides, it is nowhere explained by the Bank as to what was the necesity to suspend the employee and especially when he was not under suspension during the enquiry. Thus, it is vindictive act of the Bank.

17. Advocate Shri Patil, replied that the employee was found guilty of misconduct, thereby lost confidence of the Bank and hence was suspended. Provisions under section 101(2-A) of the BIR Act and section 33(2) of I. D. Act are anologous and thus the suspension is well justifiable. He further submitted that rate at which the employee is entitled to suspension allowance is left to the jurisdiction of this Court.

18. Section 33(3) (b) of the I. D. Act protects a protected employee. It impose unqualifide ban on employer in discharging or punishment a workman whether by dismissing or otherwise. The reason for such protection is healthy growth and development of Trade Union movement as well as to ensure a protected workman a complete protection against every kind of punishment. Same logic appears under section 101(2-A) of the BIR Act. I, therefore, *prima facie*, find that learned Labour Court has rightly held that provisions under both sections are anologous.

19. Now, turning to justifiability of the suspension order, rule of the Bank after receipt of Enquiry Officers report is material. The employee is found to be guilty of the alleged misconducts. At this stage, it will be premature to say as to whether findings of the Enquiry Officer are justifiable or perverse and whether the punishment of dismissal is legal and proper. The Labour Court has such jurisdiction under section 78 of the BIR Act. At this *prima facie* stage, the Bank is justified in suspending the Complainant, relying upon the report of the Enquiry Officer. Accordingly, I answer point No. 2 in the affirmative.

20. As regards the rate of suspension allowance, I must state that model Standing Orders applicable for banking industry are silent. There is no provision about the rate to which the suspended employee till permission of the Court to dismiss him, is entitled to. Eventually, the employee is entitled to 100% subsistance allowance. The bank is directed to pay 100% subsistance allowance to the employee from the date of suspension till decision of main application for permission. Considering peculiar facts and circumstances of this case, learned Labour Court is directed to decide main application within 3 months from to-day.

21. Finally, I pass following order :—

Order

(*i*) The Appeal is dismissed.

(*ii*) The Bank is directed to pay suspension allowance at the rate of 100% of the wages to the employee from the date of his suspension till decision of application for permission.

(*iii*) R. and P. be sent to Labour Court and the parties shall appear there on 16th January, 2003.

(*iv*) The Labour Court is directed to decide main application within 3 months from to-day.

(*v*) No order as to costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 6th January 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 100 of 1999.—General Secretary, Sarva Shramik Sangh, Shramik Pratishthan, Chandani Chowk, Near Damani High School, Sangli.—*Complainant—Versus*—(1) Partner, Balkrishna Hatcheries, At Post Bedag, Tal. Miraj, District Sangli.—*Ist par. Respondent No. 1*—(2) Managing Director, Balkrishna Breeding Farms Pvt. Ltd. At Post Bedag, Tal. Miraj, District Sangli—Respondent No. 2.

In the matter of Complaint u/s. 28(1) read with items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri T. B. Patil Representative for Complainant.

Shri H. G. Bhokare, Advocate for the Respondents.

Judgment

This is a complaint under section 28(1) read with items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

2. Now, admittedly, the Complainant-Union is registered under the Trade Unions Act. Respondent No. 1 is a partnership firm whereas Respondent No. 2 is a private limited company incorporated under the Companies Act. Both Respondents run hatcheries wherein eggs are hatched on large scale. Both Respondents have employed workmen for their business.

3. It is case of the Complainant-Union that all employees of the Respondents are its members. Both Respondents hatch eggs on large scale by adopting latest scientific and technological methods. They are using electricity for that purpose. They purchase birds from Venkatesh Hatcheries and utilise their eggs for hatching. Selected eggs are put into incubetors operated on electricity-power. After completion of 21 days, chicks come out from the eggs. Then there is process called sexing whereby male and female chicks are separated. The female chicks are then vaccinated against various diseases. Thereafter, all chicks are sold in open market. It is further alleged by the Union that the Respondents have appointed Farms Managers, Doctors, other staff and have turnover of corers of rupees. Both Respondents are sister concerns and are ancilliary to each other. Partners of Respondent No. 1 and their relatives are share holders of Respondent No. 2. One Shri Vasant Kumar is working as Managing Partner of Respondent No. 1 and Managing Director of Respondent No. 2.

4. It is further alleged by the Union that both Respondent are covered by the definition of 'factory' under Sec. 2(m) of the Factories Act and thus, are governed by provisions of Factories Act. Govt. of Maharashtra has fixed minimum rates of wages payable to the employees employed in the employment in any factory as defined under clause (m) of Sec. 2 of within the meaning of Sec. 85 of the Factories Act, not covered by any of the factories in the schedule to the Minimum Wages Act, *vide* Notification dated 6th December 1996. As such, the Respondents are bound to pay minimum wages at such rate, however, are not paying minimum wages at such rate. The Respondents are not covered by scheduled employment of agriculture. Govt. of Maharashtra has declared additional allowance for the period from 1st January 1999 to 30th June 1999 for respective zones shown in the Notification dated 6th December 1996. But the Respondents are not even paying said special allowance for the prescribed period.

5. On above averments, the Complainant-union has prayed for requisite declaration of unfair labour practices, direction to pay minimum rates of wages *w.e.f.* 6th December 1996 to all of its employees, as per Notification of same date. It has annexed list of 26th employees (Annexure A-1) working under Respondent No. 1 and another list (Annexure A-2) of 30 employees working under Respondent No. 2, alongwith the complaint.

6. The Complainant union also made an interim application (Exh. U-2) to direct the Respondents to pay wages as per Notification dated 6th December 1996, pending the hearing and disposal of main complaint.

7. Respondents 1 and 2 filed their say-cum-written statement at Exh. C-8 contending at the out set that employees named in the Annexures to the complaint are not members of the Complainant-union no evidence is produced to show that it is registered and thus, has no *locus-standi* to file the complaint. Besides, the complaint is barred by limitation and no application for condonation of delay is filed.

8. It is also case of the Respondents that subject matter of the complaint is covered by Sec. 20 of the Minimum Wages Act, specific machinery is provided under said Act for implementation of the Notifications and recovery of the arrears of minimum wages and hence, the complaint can not be entertained as per Sec. 24 of the said Act. It is then contented that, therefore, this Court has no jurisdiction to entertain alleged grievances under the M.R.T.U. and P.U.L.P. Act. The Respondents have further contended that they are seperate entities and there is no interchangability or exchange of workers between their establishments. Eventually, they cannot be treated as one and no common order can be passed against them. In fact, they are engaged in agricultural activities and paying minimum wages more than the rate fixed for scheduled industry -'agriculture' under the Minimum Wages Act. They are not a 'factory' under the Factories Act and thus, have not engaged in any unfair labour practice. Finally, they prayed for dismissal of interim application as well as the complaint.

9. Considering rival pleadings, following issues were framed by me at Exh. O-1 :—

(*i*) Does the Complainant-union prove that it is registered under the Trade Unions Act ?

(*ii*) Does the Complainant further prove that employees named in the Annexures to the complaint are its members ?

(*iii*) Whether the complaint is maintainable under provisions of the M.R.T.U. and P.U.L.P. Act ?

(*iv*) Whether the complaint is within limitation ?

(*v*) Does the Complainant further prove that establishments of Respondents 1 and 2 is a 'factory' as defined U/s. 2(m) of the Factories Act ?

(*vi*) Does the Complainant further prove that Govt. Notification dated 6th December, 1996 issued under the Minimum Wages Act, is applicable to establishments of Respondents 1 and 2 ?

(*vii*) Whether the Complainant proves that Respondents 1 and 2 have engaged in unfair labour practice/s ? If yes, under what item/s ?

(*viii*) What order ?

10. My findings on above issues are as under :—

(i) Yes.

(ii) Yes.

(*iii*) Yes.

(*iv*) Yes.

(*v*) Yes.

(*vi*) Yes.

(*vii*) Yes, under Item-9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

(*viii*) The complaint is allowed.

Reasons

11. I must state at the outset that interim appln. (Exh. U-2) was allowed by me, after hearing both parties, on 8th June 2001. The Respondents challenged the same in the Hon. High Court at Bombay by writ Petition No. 4407/2001. It was disposed of with a direction to decide main complaint within six months.

12. *Issue Nos. 1 and 2 :*—The union produced copy of its registration certification under the Trade Unions Act, with list Exh. U-35/1 and receipt books about its membership, with list Exh. U-40/1 and 2. It also produced some other membership receipts with list Exh. U-35/2. It filed a pursis at Exh. U-39 that original registration certificate is brought in the Court and the Respondents may inspect the same. It then filed affidavite (Exh. U-37 and U-38) of its two members. Affiant Shri Patil is working under Respondent No. 1 whereas affiant Shri Kamble under Respondent No. 2. They both affirmed that they and other employees are members of the Complainant union since begining. The Respondents have not led oral evidence.

13. Shri Patil, Secretary of the Complainant union, argued that registration certificate produced with list Exh. U-35/1 is not challenged by the Respondents and thus, registration under the Trade Unions Act is proved. He then submitted that various receipt books produced on record established that respective employees are members of the Complainant union. The receipt books are nowhere denied and thus, the employees are members.

14. Shri Bhokare, learned Advocate representing the Respondents replied that he is not disputing registration of the Complainant union under the Trade Unions Act.

15. Copy of registration certificate clearly proves that Complainant-union is registered under the Trade Unions Act. Receipt books showing that employees of the Respondents are members of the Complainant union are not disputed by the Respondents. Affirmation of union's witnesses that all employees of the Respondents are members of the union, is not challenged. Even otherwise, the receipt books show that employees named in the Annuexures to the complaint are members of the union. It also needs to be stated that there is no recognised union under the M.R.T.U. and P.U.L.P. Act for any of the Respondents. In such circumstances, there is no reason to disbelieve affirmation of both union witnesses. I, therefore, hold that the union is registered under the Trade Unions Act and the employees of Respondents are its members. Accordingly, I answer issue Nos. 1 and 2 in the affirmative.

16. *Issue No. 3* :—Union Secretary Shri Patil argued that remedy under the M.R.T.U. and P.U.L.P. Act is speedy one and provided to curb unfair labour practices. Non complaiance of provisions and Notification under the Minimum Wages Act is an unfair labour practice. For that he relied on decision of Hon'ble Apex Court in *S. G. Chemicals and Dyes Trading Employees Union* V/s *S. G. Chemicals and Dyes Trading Ltd. and Anr.* reported in 1986 I LLJ at P. 490. Advocate Shri Bhokare replied that the union can approach and exhaust machinery under the Minimum Wages Act. This Court cannot usurp jurisdiction under the said Act.

17. It is held in *Oswal Petro-chemicals Ltd.* V/s. *State of Maharashtra* reported in 1997 II CLR at P. 472 that non-payment of minimum wages to employees working in a canteen is act of unfair labour practice under Item-9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. It cannot be disputed that Respondents are under statutory obligation to pay minimum wages as per the Minimum Wages Act. Considering proposition laid down in S. G. Chemical's case and Oswal Petro-chemical's case (referred *supra*) non-payment of minimum wages has to be held as an unfair labour practice. It is also observed in Oswal Petro-chemical's case that Minimum Wages Act is not a complete code itself. I, therefore, hold that the complaint can well be entertained under the M.R.T.U. and P.U.L.P. Act and this Court has jurisdiction to decide the same. Accordingly, I answer issue No. 3 in the affirmative.

18. *Issue No. 4 :*—The Complainant union has alleged unfair labour practices under items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. It is held in *Maharashtra State Co-op. Cotton Growers Marketing Federation Ltd.* V/s *Maharashtra State Co-op. Cotton Growers Marketing Federation Employees Union* reported in 1992 I CLR at P. 350 (Bombay High Court) that type of unfair labour practices covered by items 6 and 9 are continuing and recurring unfair labour practices. In the light of such observations it cannot be said that the complaint is barred by limitation. On the other hand, the cause of action is recurring one and the complaint is within limitation. Accordingly, I answer issue No. 4 in the affirmative.

19. *Issue Nos. 5 and 6* .—It is an admitted position that the Respondents are engaged in hatchery business and process of hatching is carried out with the help of electricity *i.e.* power. I must state that 27 employees of Respondents 1 and 2 have entered into a settlement on 11th February 2001 and some of them are named in Annexure A-1 and A-2 of the complaint. 14 employees have filed affidavits at Exh. U-16 to Exh. U-29 that they are employees of Resp. No. 2 have entered into settlement with Respondent No. 2 and have now no demands against their employer. It has also come on record that union made some demands with Respondent No. 2 on 26th July 2002 in respect of 13 employees of Respondent No. 2 who have not parties to the settlement dated 11th February 2001.

20. Union's witness Shri Patil (Exh. U-37) deposed that he is working under Respondent No. 1 as Farm Boy. He replied in the cross-exam. that Respondent No.1 is working in an area of 12-13 acres. There are two seperate structures and working of hatching is carried out in one building. There are 9 sheds nearby the hatchery building wherein birds are kept. At present, temperature in the same is maintained by gas. There are 3 Asstt. Supervisors and 2 supervisors to control the working. Another witness Shri Kamble (Exh. U-38) is working under Respondent No. 2. He explained that there are 10 sheds of Respondent No. 2 and a seperate hatchery building.

21. It has further come on record that Managing Director of Respondent No. 2 was prosecuted in the Court of Judicial Magistrate First Class, Miraj by Asstt. Director of Factories Act on the allegations of having committed an offence under Rule-4(4) of the Maharashtra Factories Rules punishable under Sec. 92 of the Factories Act. He was acquitted on the ground that employment of more than 10 workers at the relevant time, is not proved and hence unit of Respondent No. 2 does not fall under the definition of 'factory' under Sec. 2(m) of the Factories Act. I must also state that Respondent No. 2 filed Regular Civil Suit No. 603 of 1991 in the Court of Civil Judge, Sr. Dn., Sangli against Govt. of Maharashtra and Factory Inspector for a declaration that hatchery is not a manufacturing process as defined under Sec. 2(k) of the Factories Act and restraining them from insisting to obtain licence under the Factories Act. It was dismissed on 25th March 1997 holding that hatchery premises is a factory under the Factories Act. Respondent No. 2's appeal bearing Regular Civil Appeal No. 90/1998 challenging said decision is also dismissed by second *Ad-hoc* Addl. District Judge, Sangli on 1st November 2002. Thus, competent Civil Court has held that hatchery is a manufacturing process as defined under Sec. 2(k) of the Factories Act and Respondent No. 2 is a factory as defined under Sec. 2(m) of the said Act.

22. General Secretary Shri Patil pointed out that there is no evidence to show that Respondents 1 and 2 are seperate one. New plea brought in cross-exam. of union's witnesses that hatchery and farm are different, is unsustainable. Agreement dated 11th September 2000 shows that farm hatchery boys are from one category. It also says that Asstt. Farm/hatchery Supervisor and Farm/Hatchery Supervisor are also from same category. Open space including the building is covered by definition of 'factory' under Sec. 2(m) of the Factories Act. For that end, he relied upon decision in *Grauer and Weil (India) Ltd.* V/s. *Collector of Central Excise, Baroda* reported in 1995 II LLJ at P. 648 (S. C.). He then submitted that definition of the term 'manufacturing process' has to be interpreted considering object of enactment of the Factories Act. It cannot be accepted that sheds and hatchery building have nothing to do with each other, however, are part and parcel of same premises. He placed reliance on decision in *Madhu Fantasy Land Pvt. Ltd. Mumbai and Anr.* V/s. *Maharashtra General Kamgar Union, Mumbai and Anr.* reported in 2002 III LLJ at P. 587 (Bombay High Court). He argued that both Respondents are working with the aid of power and have more than 10 employees. No evidence is produced by the Respondents to establish that hatching is a poultry business and is part and parcel of scheduled employment No. 1 of part II of the schedule of the Minimum Wages Act, *i.e.* Agriculture.

23. Advocate Shri Bhokare replied that entire process of hatching is undisputed. However, chicks come out of eggs by natural process and it no where amounts to manufacture of an article. An egg is an animate. It cannot be an article or substance. Hatching is a natural process, whereby chicks come out of eggs. All the factories are 'industry' but all industries are not factory. In fact, authorities constituted under the Factories Act can well decide as to whether the Respondents are covered by provisions under the Factories Act. None of them have taken any legal action for non-compliance of provisions under the Factories Act. Such fact clearly establishes that the Respondents are not carrying 'manufacturing process' and is not a 'factory' under the Factories Act. The union is presuming that the Respondents are carrying 'manufacturing process' and is a 'factory'. He then placed reliance on decision of our High Court in *Commissioner of Income Tax* V/s. *Beejay Hatcheries* reported in Income Tax Reporter Vol. II at P. 652. He then submitted that there is Govt. Notification dated 24th April 1998 prescribing minimum rates of wages for agriculture *i.e.* a scheduled industry. It is stated in Govt. Notification dated 6th July 1989 that hatching should not be understood as a seperate 'industry' but should be understood as an 'agriculture'.

24. Advocate Shri Bhokare further submitted that Laundry Department of a hospital, drycleaning business, petrol pump are not covered by the term 'manufacturing process'. He relied upon various decisions in that behalf. I will refer them in my further discussion.

25. In Beejay Hatchery's case a material question was whether hatchery can be characterised as an industrial under taking engaged in manufacture or production of articles. I must state that said decision is regarding interpretation of provisions under the Income Tax Act. It is observed that parliement has made provision for giving incentive to persons engaged in the business of levestock breeding or poultry or dairy farming distinct and different from those made for industrial undertakings producing or manufacturing articles. The Factories Act is enacted to provide protection to the workers from being exploited and for the improvement of the working conditions within the factory premises. Such observations are made in *Ravi Shankar* V/s *State* reported in 1993 I CLR at P. 237. As such, beneficial construction should be given to the provisions of the Factories Act. In such circumstances, observations in Beejay Hatcheries case cannot be applied here.

26. It is well established on the record that each of the Respondents has employed more than 20 workers and hatching the eggs with the aid of electricity *i.e.* power. Main building and the sheds cannot be seperated. It is observed in *Grauer and Weil (India) Ltd.* V/s. *Collector of Central Excise* (referred above) that words 'any premises' including the precincts thereof occuring in Sec. 2(m) of the Factories Act are wide enough to include all buildings with the surrounding which form part of the unit. Eventually, entire campus of Respondents 1 and 2 has to be considered together.

27. Advocate Shri Bhokare relied on decision of Rajasthan High Court in *Ravi Shanker* V/s. *State of Rajasthan* (referred above). It is observed that activity of running a petrol/diesel pump is not covered by the definition of 'manufacturing process', while the process/activity of 'cleaning', 'oiling', 'washing', 'lubricating' or 'reparing' of the vehicles at the service station, is covered by the definition of manufacturing process. It is further observed that if in the said process, requisite number of workers are employed as mentioned in Sec. 2(m) of the Factories Act, then the premises is 'factory' and for running such factory a licence is necessary under the Factories Act.

28. Advocate Shri Bhokare further relied upon decision of Kerala High Court in *V. M. Patel* V/s. *Inspector of Factories,* Always reported in AIR 1958 Kerala 237. Intesion of the Legislature while defining the term 'manufacturing process' under Sec. 2(k) of the Factories Act is made clear. It is observed that the Legislature has made a deliberate attempt to make the definition all comprehensive so as to bring within it all conceivable activities in the course of commerce and industry. It is further observed that the process of garbling pepper by washing and drying it and packing the dried pepper in gunny bags after winnowing the dried pepper to remove all dust and dirt no doubt cannot come under the definition contained in parts 2 to 5 of clause (*k*), but there can be no doubt that it amounts to a manufacturing process as defined in the first part of clause (*k*).

29. No doubt hatching is 'Natural process'. But the Respondents are doing the same artificialy with the help of an incubator. It has also come on the record that only selected eggs are kept in the hatch machine for perfect and better chicks.

30. The words 'or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal' occuring in clause (*i*) of Sec. 2(*k*) of the Factories Act are material for our purpose. Eggs are treated artificially in an incubator in lieu of natural hatching and the process of hatching is artificial one. Meaning of the word 'adapting', in my opinion, means something to be done to the article so as to make it different from what it was before. In general terms and as per dictionary meaning the word 'manufacture' indicates transformation and the article becomes commercially known as another and different article from that as which it begins its existance. However, the definition of 'manufacturing process' in the Factories Act is worded in most wide and flexible terms and it is difficult to prescribe any test and thus to limit the flexibility. Similarly, the word adapting for safe may have different connotations. One test is whether the article after employment of the manufacturing process was different from what it was before.

31. It is observed in *Col. Sardar C. Angre* V/s. *The State and Anr.* reported in AIR 1965 Rajasthan at P. 65 as under :—

> "If the gradation or the sorting is with a view to bring into existance standardized goods of a particular category or variety saleable as such, I do not see any difficulty in treating, grading or sorting as manufacturing process. If, on the other hand, garding is only casual and is not done with a view to achieve the object indicated earlier, grading will not be a manufacturing process."

32. Decision of Bombay High Court in Gateway Auto Service *V/s* Regional Director, E. S. I. Corporation is referred in Ravi Shankar Sharma's case (supra). It is observed that treating or adapting any article has to be independently read. It was then held that washing, cleaning or oiling means manufacturing process.

33. Considering above observations it has to be held that hatching of eggs is clearly covered by the words 'treating or adapting any article' appearing in clause (*i*) of definition of 'manufacturing process' under Sec. 2(*k*) of the Factories Act. The Respondents have admittedly employed more than 20 workers. Consequently, it has to be held that they are 'factory' as defined under Sec. 2(*m*) of the Factories Act. Accordingly, I answer issue No. 5 in the affirmative. It consequently follows that notification dated 6th December 1996 is applicable to the establishments of the Respondents. Accordingly, I answer issue No. 6 in the affirmative.

34. *Issue Nos. 7 and 8.*—In the background of above discussion and findings, I hold that the Respondents were under statutory obligation to pay minimum wages prescribed in the Notification dated 6th December 1996 and revised from time to time. However, it has failed to discharge the same. As such, it amounts to breach of provisions under the Minimum Wages Act and is an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. I answer issue No.7 accrodingly.

35. Now, turning to the question of reliefs, it has come on record that some employees of Respondent No. 2 have settled their grievances *vide* Agreement dated 11th February 2002. However, that does not mean that the Respondents can pay less wages than prescribed in the Notification dated 6th December 1996 and revise from time to time. As such, settlement dated 11th February 2001 does not relieve the Respondents from discharging their statutory obligation to abide by the Notification dated 6th December 1996. Consequently, they are bound to pay minimum wages payable to employees employed in the employment in any factory as defined under section 2(*m*) of the Factories Act.

36. In the result, I pass following order :—

Order

(*i*) The complaint is allowed.

(*ii*) It is declared that the Respondents 1 and 2 have engaged in an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

(*iii*) Respondents 1 and 2 are directed to cease and desist from engaging in such unfair labour practices, forthwith.

(*iv*) Respondents 1 and 2 are directed to pay minimum wages with effect from 6th December 1996 to all of its employees as per Notification dated 6th December 1996; whereby minimum rates of wages are fixed. They are further directed to pay minimum rates of wages, revised from time to time for schedule employment No. 66, stated in the schedule to the Minimum Wages Act, to all of its employees. The entire difference of minimum wages be paid on or before 28th February 2003.

(*v*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 24th January 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

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BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 155 of 2002.—Shekhar Martand Kawale, Rajarampuri, 3rd Lane, Kolhapur.—*Complainant*—*Versus*—Shri Shahu Chhatrapati Mills, Bagal Chowk, Kolhapur.—*Respondent.*

In the matter of Complaint u/s. 28(1) read with items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri A. G. Pansare, Advocate for the Complainant.

Shri S. L. Pise, Advocate and Shri A. P. Chougule, Advocate for the Respondent.

Judgment

(Dictated in open Court)

This is a complaint under section 28(1) read with items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

2. Admittedly, the Complainant is in employment of the Respondent-Mill and is a protected employee. The Mill served a chargesheet dated 13th May 1998 upon him alleging certain misconducts and suspended him, pending the enquiry. On completion of enquiry, he was served with show cause notice dated 3rd February 1999 to explain about the punishment to be imposed. He aprehended punishment of dismissal and then filed Complaint (ULP) No. 28/99 before the Labour Court, Kolhapur alleging unfair labour practices under items 1(a), (b), (d), (f) and (g) of Sch. IV of the M.R.T.U. and P.U.L.P. Act. The Mill also filed Application (BIR) No. 2/99 under section 101 (2A) of the BIR Act before the Labour Court, Kolhapur seeking permission to award punishment of dismissal upon the Complainant. Both matters were clubbed together and decided by a common judgment. Learned Labour Court, allowed the complaint, *vide* judgment and order dated 26th November 2001, holding that the Mill has engaged in an unfair labour practice under items (b) and (g) of clause 1 of Sch. IV of the M.R.T.U. and P.U.L.P. Act but permitted the Mill to award any other punishment than of dismissal for the proved misconduct. Chargesheet-*cum*-suspension order does not contain a clause that the Complainant shall mark daily attendance at Mill's main gate. After above decision of the Labour Court, the Mill served order dated 10th May 2002 upon the Complainant stating that the misconducts are proved and he shall mark daily attendance at its main gate, till imposition of punishment.

3. It is case of the Complainant that decision of Labour Court in Complaint (ULP) No. 28/99 is not challenged by the Mill and thus, is binding upon the Mill. Order dated 10th May 2002 directing to mark daily attendance at Mills gate is contrary to suspension order as well as the Standing Orders and is an unfair labour practice under items 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. It is alleged that there is no justification whatsoever for imposing such condition and the same is imposed only because he filed a complaint before Labour Court challenging his proposed dismissal. Condition of marking attendance is *malafide* one and colourable exercise of employer's right.

4. On above averments the Complainant has prayed for requisite declaration of unfair labour practice necessary directions and to quas and set aside order dated 10th May 2002.

5. The Complainant also made an application (Exh. U-2) under section 30(*2*) of the M.R.T.U. and P.U.L.P. Act for temporary withdrawal of impugned condition, till decision of main complaint.

6. The Mill filed its say cum written statement at Exh. C-7 contending that proved misconducts are grave and serious. Second show cause notice dated 3rd February 1999 for inflicting punishment was served upon the Complainant, although the standing orders do not make it mandatory. Approved and Representative Union appeared in Application (BIR) No. 2/99 filed before the Labour Court and debarred the Complainant from contesting the election as well as its membership for 6 years. Such material fact is suppressed by the Complainant. It is further contended that suspension order has culminated and amalgameted on completion of domestice enquiry and cause of paying subsistence allowance to the Complainant get diluted.

In addition, it was mandatory for the Complainant to report for duty after decision of Labour Court in complaint (ULP) No. 28/99. A Memorandum was issued to the Complainant to report for duty. It is alleged that the Complainant is in habit of extracting subsistance allowance without reporting for duty and hence is not entitled to any relief. Finally, the Mill justified its action and prayed for dismissal of the application as well the complaint.

7. After hearing both parties, interim application (Exh. U-2) was allowed by me by order dated 17th July 2002 and the Mill was directed to temporary withdraw impugned condition till decision of main complaint. There is nothing on record to show that the Mill challenged said order in the Hon'ble High Court, Bombay.

8. The Mill is going to be close on 16th January 2003 and hence the Complainant prayed for urgent hearing. He filed pursis (Exh. U-9) that he does not wish to lead oral evidence. The Mill also filed a pursis (Exh. C-10) that it does not wish to lead oral or documentary evidence.

9. Considering rival pleadings, following points arise for my determination :—

(*i*) Does the Complainant prove that impugned condition of marking daily attendance at Mill's main gate is contrary to the Standing Orders and unsustainable in law ?

(*ii*) Does the further prove that the Mill has engaged in an unfair labour practice under the M.R.T.U. and P.U.L.P. Act ? If yes, under what item ?

(*iii*) What order ?

10. My findings on above points, are as under :—

(*i*) Yes.

(*ii*) Yes, under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

(*iii*) The complaint is allowed.

Reasons

11. The Complainant has produced impugned order dated 10th May 2002 of the Mill directing him to mark daily attendance at its main gate and copy of chargesheet-*cum*-suspension order dated 13th May 1998 with list Exh. U-6. The Mill has produced copy of judgment of Labour Court in Complaint (ULP) No. 28/99 and reports of Security Officer that the Complainant did not mark attendance at its main gate, with list Exh. C-9. It then produced copy of its certified standing orders.

12. It is stated in impugned order dated 10th May 2002 that misconducts are proved, it is not obligatory for the Mill to pay subsistance allowance to the Complainant, however, the Complainant should mark daily attendance at Mill's main gate till imposition of any punishment upon him.

13. Shri Pansare, learned Advocate representing the Complainant argued that the Respondent Mill has nowhere informed the Complainant in writing that his suspension is withdrawn and he shall report for duties. There cannot be oral withdrawal of suspension order and that too in the form of the Written Statement (Exh. C-7). In fact, proper course for the Respondent Mill was to officially withdraw suspension order and then impose proper punishment subject to orders of Labour Court. He further added that Certified Standing Orders do not permit the Mill to impose condition of daily attendance. No doubt, Mill's Manager can pass certain order but those are subject to provisions of the BIR Act. Model Standing orders under the BIR Act nowhere permit imposition of condition of daily attendance. In support of his arguments, he relied on decisions in *Vishwanath Rai* V/s. *U. P. State Spinning Company reported in 1992 I CLR at page 591 and Zonal Manager* V/s. *Khalil Ahmed reported in 1982 Lab. I. C. at page 840.*

14. Shri Chougule, learned Advocate representing the Respondent Mill replied that suspension has now come to an end on completion of enquiry. Labour Court has permitted the Mill to impose condition of daily attendance. In support of his arguments, he relied on decisions in *Laxman* V/s. *State of M. P. reported in AIR 1959 (M. P.) at page 295 and Probodh* V/s. *Executive Engineer reported in AIR 1956 (Calcutta) at page 447.*

15. I am respectfully bound by the decisions relied by both Advocates. The Mill proposed to dismiss the Complainant and hence sought permission from Labour Court, Kolhapur *vide* Application (BIR) No. 2/99. But the Labour Court directed the Mills to award any other punishment than of dismissal. Admittedly, no punishment is imposed till to-day. In other words, punishment is yet to be imposed.

16. Decision of Hon'ble Apex Court in *Om Prakash* V/s. *State of U. P.* reported in *AIR 1955 S. C. at page 600,* is relied in both divisions cited by Advocate Shri Chougule. It is observed that order of suspension lapses after passing order of dismissal by way of penalty. In other words, order of suspension marges into order of dismissal after passing the order of dismissal. It is held in *Laxman* V/s. *State of M. P. (referred supra)* that order of suspension merges into order of removal and it could not revive when the later order was cancelled. In my judgment, therefore, final order has to be passed against the Complainant so that the suspension order can merge into the same. Interestingly, the Mill has not passed the final order. As such, decisions relied by Advocate Shri Chougule cannot be applied to the facts of this case.

17. No doubt, the enquiry is completed and the Mill has yet to award punishment. It has nowhere withdrawn the suspension order directing Complainant to report for duty by reserving its right to impose proper punishment. Therefore, in the eyes of law, the Complainant is still under suspension till awarding punishment for the proved misconducts. Consequently, decisions relied by Advocate Shri Pansare can to applied here.

18. No doubt, Mill's Manager has authority to impose some condition as per clause 24 of the Certified Standing Orders, however, those must be subject to provisions of BIR Act. The standing orders do not contain any provision or authority empowering the management to direct the delinquent employee to mark daily attendance. Advocate Shri Chougule was unable to point out any such provision from the Certified Standing Orders. I am unable to appreciate as to why no further action is taken from 26th November 2001 *i.e.* after decision of Labour Court. Besides, no material purpose will be served by directing the Complainant to mark daily attendance. In such circumstances, impugned condition is contrary to provisions standing orders and neither sustainable nor justifiable. Mill's such act is, therefore, an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. I answer points 1 and 2 accordingly and pass following order :—

Order

(*i*) The complaint is allowed.

(*ii*) It is declared that the Respondent-Mill has engaged in an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

(*iii*) Respondents Mill is directed to cease and desist from engaging in such unfair labour practice, forthwith.

(*iv*) Impugned order dated 10th May 2002 directing the Complainant to mark daily attendance at Mill's main gate till imposition of punishment, is quashed and set aside.

(*v*) No order as to costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 15th January 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 63 of 2002.—Manik Bhimrao Patil, R/o. Khochi, Tal. Hatakanagale, District Kolhapur.—*Complainant*—*Versus*—Nipurn Engineering Pvt. Ltd., Plot No. C-22, M.I.D.C., Gokul Shirgaon, Dist. Kolhapur.—Respondent.

In the matter of Complaint under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri A. G. Pansare, Advocate for the Complainant.

Respondent absent.

Judgment

(Dictated in open Court)

This is a complaint purported to be under section 28(*1*) read with item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

2. Admittedly, the Complainant filed workmen's Compensation Application No. 36 of 2000 before the Commissioner under Workmen's Compensation Act claiming compensation of Rs. 1,09,812 from present Respondent for an accident arising out of and during the course of his employment. It was settled in Lok Adalat on 30th September 2001 for an amount of Rs. 45,000 whereby present Respondent agreed to deposit said amount in the Court, within one month from said date. Eventually, compensation application was settled in terms of compromise pursis (Exh. 16). It is case of the Complainant that he met the Respondent and requested to pay agreed compensation of Rs. 45,000. However, Respondent refused to pay the same. He then served notice dated 15th December 2001 upon the Respondent calling upon to pay the compensation of Rs. 45000. The Respondent received the notice but neither complied nor replied the same. It is alleged that Respondents failure to implement the settlement dated 30th September 2001 is an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. Consequently, requisite declaration of unfair labour practice and direction to implement the settlement are claimed.

3. The Respondent was duly served with notice of the complaint, however failed to appear. Eventually, the Complainant was permitted to file an affidavit (Exh. U-8) in support of his claim.

4. Now, following points, arise for my determination :—

(*i*) Does the Complainant prove that the Respondent has engaged in unfair labour practice under 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act ?

(*ii*) What order ?

5. My findings, on above points, are as under :—

(*i*) Yes.

(*ii*) The complaint is allowed.

Reasons

6. The Complainant has produced certified copies of the settlement pursis and his original Application for compensation, filed before the commissioner under Workmen's Compensation Act. He has also produced copy of notice dated 15th December 2001 and its acknowledgment. His averments in affidavit (Exh. U-8) stand unrebutted. The Respondent is under statutory obligation to comply the settlement. Failure to comply the same is an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. Accordingly, I answer point No. 1 in the affirmative and pass following order :—

Order

(*i*) The complaint is allowed.

(*ii*) It is declared that the Respondent Mill has engaged in an unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

(*iii*) The Respondent is directed to cease and desist from engaging in such unfair labour practices, forthwith.

(*iv*) The Respondent is directed to pay Rs. 45,000 to the Complainant, within one month from to-day.

(*v*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 13th January 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

———

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 156 of 2002.—Sunil Vasantrao Patil, 1330/22, Chatrapati Colony, 'E' ward, Kolhapur.—*Complainant*—*Versus*—Shri Shahu Chatrapati Mills, Bagal Chowk, Kolhapur.—Respondent.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri A. G. Pansare, Advocate for the Complainant.

Shri S. L. Pise and Shri A. P. Chougule, Advocate for the Respondent.

Judgment

(Dated 15th January 2003)

This is a complaint under section 28(1) read with item 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

2. Admittedly, the Complainant is in employment of the Respondent Mill. The Mill served a charge sheet dated 29th April 1999 upon him alleging certain misconducts and suspended him, pending the enquiry. On completion of the enquiry, he was served with show cause notice dated 14th September 1999 to explain about the punishment to be imposed. He apprehended punishment of dismissal and filed Complaint (ULP) No. 299/1999 before Labour Court, Kolhapur alleging unfair labour practice under item 1 of schedule IV of the M.R.T.U. and P.U.L.P. Act, 1971. He also made an application (Exh. U-2) for interim relief. Learned Labour Court allowed the same, after hearing both parties and restrained the mill from awarding punishment of dismissal, till decision of main complaint. It granted liberty to the mill to pass any other punishment than of dismissal. Revision Application (ULP) No. 34/2000 filed in this Court by mill challenging the interim order is dismissed on 8th January 2002. Charge-sheet *cum* suspension order does not contain a clause that the Complainant shall mark daily attendance at mill's main gate. The mill served order dated 10th May 2002 upon the Complainant stating that the misconducts are proved and he shall mark daily attendance at its main gate, till imposition of punishment.

3. It is case of the Complainant that interim order passed in Complaint (ULP) No. 299/1999 and confirmed in Revision Application is still in force and is binding upon the mill. Order dated 10th May 2002 directing to mark daily attendance at mill's gate is contrary to suspension order as well as the standing orders and is an unfair labour practice under item 9 and 10 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. It is alleged that there is no justification whatsoever for imposing such condition and the same is imposed only because he filed a complaint before Labour Court challenging his proposed dismissal. Condition of marking attendance is *malafide* one and colourable exercise of employer's right.

4. On above averments, the Complainant has prayed for requisite declaration of unfair labour practice, necessary directions and to quash and set aside order dated 10th May 2002.

5. The Complainant also made in application (Exh. U-2) under section 30(2) of the M.R.T.U. and P.U.L.P. Act for termporary withdrawal of impugned condition, till decision of main complaint.

6. The Respondent mill filed it's say-cum-written statement at Exh. C-7 contending that proved misconducts are grave and serious. Second show cause notice dated 14th September 1999 for inflicting punishment was served upon the Complainant although the standing orders do not make it mandatory. Facts of filing Complaint (ULP) No. 299/1999 and Revision Application (ULP) thereof are suppreassed by the Complainant.

7. It is further case of the Respondent-mill that suspension order is culminated and amalgated on completion of domestic enquiry and the cause of paying subsistance allowance to the Complainant gets diluted. In addition, it was mandatory for the Complainant to report for duty after orders of Labour Court in Complaint (ULP) No. 201/1999. A memorandum was issued to the Complainant to report on duty. It is habit of the Complainant to extract subsistance allowance without reporting for duty. As such, he is not entitled to any relief. Thus, the Respondent justified it's action and prayed for dismissal of interim application as well as the complaint.

8. After hearing both parties, interim application (Exh. U-2) was allowed by me by order dated 17th July 2002 and the mill was directed to temporary withdraw impugned condition till decision of main complaint. There is nothing on record to show that the mill challenged said order in the Hon'ble High Court, Bombay.

9. The mill is going to be closed on 16th January 2003 and hence the Complainant prayed for urgent hearing. He filed pursis (Exh. U-8) that he does not wish to lead oral evidence. The mill also filed a pursis (Exh. U-11) that it does not wish to lead oral or documentary evidence.

10. Considering rival pleadings, following points arise for my determination :—

(*i*) Does the Complainant prove that impugned condition of marking daily attendance at mill's main gate is contrary to the standing orders and unsustainable in law ?

(*ii*) Does he further prove that the mill has engaged in an unfair labour practice under the M.R.T.U. & P.U.L.P. Act ? If yes, under what item ?

(*iii*) What order ?

11. My findings on above points, are as under :—

(*i*) Yes.

(*ii*) Yes, under item-9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

(*iii*) The complaint is allowed.

Reasons

12. The Complainant has produced impugned order dated 10th May 2002 and copy of charge-sheet *cum* suspension order dated 29th April 1999, with list Exh.U-6. The mill produced copy of order passed below Exh. U-2 in Complaint (ULP) No. 299/1999 and of Judgment in Revision Application (ULP) No. 34/2000. It produced copy of certified standing orders in sister complaint bearing Complaint (ULP) No. 155/2002. It also produced copy of Judgment in BIR Application No.8/1996 delivered by Labour Court, Kolhapur, however, the same has no nexus with this controversy.

13. Shri Pansare, learned Advocate representing the Complainant argued that the Respondent mill has nowhere informed the Complainant in writing that his suspension is withdrawn and he shall report for duties. There cannot be oral withdrawal of suspension order and that too in the form of the written statement (Exh. C-7). In fact, proper course for the Respondent mill was to officially withdraw suspension order and then impose proper punishment subject to orders of Labour Court. He further added that certified standing orders do not permit the mill to impose condition of daily attendance. No doubt, Mill's Manager can pass certain order but those are subject to provisions of the B. I. R. Act. Model Standing Orders under the B.I.R. Act no where permit imposition of condition of daily attendance. In support of his arguments, he relied on decisions in *Vishwanath Rai* V/s *U. P. State Spg. Company* reported in 1992 I CLR at P. 591 and *Zonal Manager* V/s. *Khalil Ahmed* reported in 1982 Lab. IC at P. 840.

14. Shri Chougule, learned Advocate representing the Respondent-mill replied that suspension has now come to an end on completion of enquiry Labour Court has permitted the mill to impose condition of daily attendance. In support of his arguments, he relied on decisions in *Laxman* V/s. *State of M. P.* reported in AIR 1959 (MP) at P. 295 and *Probodh* V/s *Executive Engineer* reported in AIR 1956 (Calcutta) at P. 447.

15. I am respectfully bound by the decisions relied by both Advocates. The mill proposed to dismiss the Complainant and hence sought permission from Labour Court, Kolhapur *vide* Application (BIR) No. 2/1999. But the Labour Court directed the mill to award any other punishment than of dismissal. Admittedly, no punishment is imposed till today. In other words, punishment is yet to be imposed.

16. Decision of Hon'ble Apex Court in *Om Prakash* V/s *State of U. P.* reported in AIR 1955 SC at P. 600, is relied in both decisions cited by Advocate Shri Chougule. It is observed that order of suspension lapses after passing order of dismissal by way of penalty. In other words, order of suspension merges into order of dismissal after passing the order of dismissal. It is held in *Laxman* V/s *State of M. P.* (referres supra) that order of suspension merges into order of removal and it could not revive when the later order was cancelled. In my judgment, therefore, final order has to be passed against the Complainant so that the suspension order can merge into the same. Interestingly, the mill has not passed the final order. As such, decisions relied by Advocate Shri Chougule cannot be applied to the facts of this case.

17. No doubt, the enquiry is completed and the mill has yet to award punishment. It has nowhere withdrawn the suspension order directing the Complainant to report for duty by reserving its right to impose proper punishment. Therefore, in the eyes of law, the Complainant is still under suspension till awarding punishment for the proved misconducts. Consequently, decisions relied by Advocate Shri Pansare can be applied here.

18. No doubt, Mill's Manager has authority to impose some condition as per clause-24 of the certified standing orders, however, those must be subject to provisions of B. I. R. Act. The standing orders do not contain any provisions or authority empowering the management to direct the delinquent employee to mark daily attendance. Advocate Shri Chougule was unable to point out any such provision from the certified standing orders. Besides, no material purpose will be served by directing the Complainant to mark daily attendance. In such circumstances, impugned condition is contrary to provisions of standing orders and neither sustainable nor justifiable. Mill's such act is, therefore, an unfair labour practice under item-9 of Sch. IV of the M. R. T. U. and P. U. L. P. Act. I answer point-1 and 2 accordingly and pass following order :—

Order

(*i*) The complaint is allowed.

(*ii*) It is declared that the Respondent Mill has engaged in unfair labour practice under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

(*iii*) The Respondent-Mill is directed to cease and desist from engaging in such unfair labour practices forthwith.

(*iv*) Impugned order dated 10th May 2002 directing the Complainant to mark daily attendance at Mill's main gate till imposition of punishment, is quashed and set aside.

(*v*) No order as to costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 15th January 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

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